Supreme Court, U.S.
FILED
JAN 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1281

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

PENERS L. GRIFFIN, *et al.*,

Petitioners,

v.

RICHARD L. DUGGER, *et al.*,

Respondents.

APPENDIX OF OPINIONS AND STATUTES TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JULIUS LEVONNE CHAMBERS
RONALD L. ELLIS
CHARLES STEPHEN RALSTON
CLYDE E. MURPHY*
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

HARRY L. WITTE
JERRY G. TRAYNHAM
PATTERSON AND TRAYNHAM
1213 Thomasville Road
Post Office Box 4289
Tallahassee, Florida 32315
(904) 224-9181

Counsel for Petitioners

*Counsel of Record

Table of Contents

		Page
1.	Decision of the United States Court of Appeals for the Eleventh Circuit, August 7, 1987	1a
2.	Order of the United States District Court for the Northern District of Florida, Tallahassee Division, March 12 1981	86a
3.	Order of the United States District Court for the Northern District of Florida, Tallahassee Division, July 30, 1982	95a
4.	Memorandum Opinion of the United States District Court for the Northern District of Florida, Tallahassee Division, August 25, 1983	111a
5.	42 U.S.C. § 2000e-5(b).	189a

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Northern District of Florida

No. 85-3831

Decided: August 7, 1987

PENERS L. GRIFFIN and HENRY L. DEJERINETT,

Plaintiffs-Appellees,

v.

RICHARD L. DUGGER, etc., et al.,

Defendants-Appellants.

Before TJOFLAT and HATCHETT, Circuit Judges, and EATON*, Senior District Judge.

TJOFLAT, Circuit Judge:

I.

In April 1971, Peners L. Griffin became the first black road Prison Officer at the Tallahassee Road Prison, operated by the Florida Department of Corrections (FDOC or Department). Be-

ginning in 1973, Griffin frequently sought promotion to higher-grade correctional officer positions, as well as various other positions. On each occasion, the FDOC turned him down.

In December 1974, Griffin's supervisor fired him for disciplinary reasons. The next day, the Regional Superintendent reinstated Griffin because the supervisor had not followed proper termination procedures. In early 1975, the FDOC again terminated Griffin's employment, without notice, for disciplinary reasons. He appealed the termination to the State of Florida Career Service Commission. The Commission found no just cause for Griffin's discharge and ordered the FDOC to reinstate him with back pay. The Florida District Court of Appeal affirmed the Commission's decision, and the FDOC reinstated Griffin to his position.

Soon after Griffin's reinstatement, he filed a complaint with the FDOC's Equal Employment Opportunity Program Office, charging that his two dismissals were racially discriminatory. An investigator in that office wrote Griffin a month later and informed him of his conclusion that racial discrimination had not been a factor in the dismissals. Within a day or two of having received that letter, Griffin filed a complaint with the Equal Employment Opportunity Commission (EEOC), detailing the events leading up to his allegedly discriminatory dis-charges. A notation at the beginning of Griffin's complaint, probably made by an EEOC counselor, describes Griffin's alle-gations of racial discrimination as also encompassing "[s]incerity of recruiting, hiring, and promoting of minority groups

within the Florida's Division of Adult Corrections. Specific attention within the Community Service Program."

Griffin asked the EEOC for a right-to-sue letter and received one in July 1979. On October 15, 1979, Griffin brought this action in the district court against Louis L. Wainwright, as Secretary of the FDOC, the FDOC, and the State of Florida. Griffin alleged that the FDOC had denied him several promotions because of his race. He also alleged that the FDOC impermissibly considered race in all of its promotion decisions, as well as in its hiring and job assignment decisions. In hiring correctional officers, according to Griffin, the Department used written entry-level examinations having a detrimental impact upon blacks.[1]

---

[1] The district court found the following facts concerning the FDOC's written entry-level examination: "Every

Griffin sued "individually and on behalf of all others similarly situated," pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure, seeking declaratory and injunctive relief and money damages under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1976)(current version of 42 U.S.C. §§ 2000e to 2000e-17 (1982)), 42 U.S.C. § 1981 (1976),[2] and 42 U.S.C. §

---

person seeking a position as a correctional officer is required to take a written examination. The Department of Administration developed the correctional Officer I entry level test which consists of seventy-five questions. An applicant must receive a score of at least thirty-eight for employment consideration."

[2] §1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and

1983 (1976).[3] The class identified in his complaint was composed "of all past, present and potential black American

---

exactions for every kind, and to no other.

[3] § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of a State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Griffin's complaint stated that his action was brought "pursuant to 42 U.S.C. § 1983, to redress the deprivation of the Plaintiff GRIFFIN's property interests in his employment, without due process of law." We assume that Griffin's section 1983 claim also encompassed the theory that the FDOC's conduct amounted to invidious discrimination in the violation of the fourteenth amendment's equal protection clause.

citizens and residents who have been, are or may be employees of the Defendants or applicants for employment."[4]

On June 17, 1980, Griffin obtained leave of court to amend his complaint to add Henry L. Dejerinett as a party-plaintiff and class representative. Dejerinett, who is black, had applied for an FDOC clerical position but was not

---

[4] The claims described in the text were presented in count I of Griffin's complaint, which contained two counts. Count II, which is not pertinent to this appeal, alleged that Griffin was denied due process and equal protection of the law when the FDOC terminated his employment in 1975; Griffin alleged that the FDOC(a) failed to give him notice of the reason for his discharge and an opportunity to be heard before terminating his employment and (b) discharged him because of his race. Count II further alleged that because Chapter 110 of the Florida Statutes, which governs state employment, did not require the Department to give him notice, a hearing, or back pay, Chapter 110 was unconstitutional.

hired.[5] On March 10, 1981, based on a stipulation between the parties[6] and without a hearing, the district court preliminarily certified the case as a class action with Griffin and Dejerinett

---

[5] Dejerinett subsequently filed a timely charge of racial discrimination against the FDOC with the Florida Commission on Human Relations, a deferral agency for the EEOC. He requested and received a right-to-sue letter from the EEOC in April 1980.

[6] The parties stipulated, among other things, that

> [t]he allegations of race discrimination in the ... Complaint involve questions of law and fact which, under current law in the United States Court of Appeals, Fifth Circuit, are common to the class, including statistical evidence, evidence concerning the employment system of the State of Florida Department of Corrections, and the common legal principles applied to claims of race discrimination. The parties maintain their right to brief these issues on appeal, if any.

The parties also "reserve[d] the right to move to decertify or limit the class, or to establish subclasses, at any time during the pendency of this litigation."

representing the class of "all past, present, and potential black employees of the State of Florida Department of Corrections."

On June 25, 1982, the defendants filed a Notice Regarding the Adequacy of the Preliminary Class Certified," which called to the court's attention a Supreme Court decision rendered eleven days previously. That decision, General Tel. Co. v. Falcon, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), announced the appropriate standards courts should apply when determining class action certifications in the context of a Title VII suit, reversing a former Fifth Circuit decision permitting "across-the-board" class actions that had been binding precedent in the new Eleventh Circuit.[7] On July 8,

---

[7] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc), this court adopted as binding

1982, the defendants moved the court, in light of Falcon, to vacate its order certifying the class.

To avoid the risk that the district court might vacate its order certifying the class, Griffin and Dejerinett took steps to obtain an additional named plaintiff to represent those in the class who had applied for the position of correctional officer, failed the written entry-level examination, and not been hired. Accordingly, on July 8, 1982, Alvin Smith, joined by Griffin and Dejerinett, moved the court to intervene as an additional named plaintiff and class representative. In 1980 and 1981, Smith, who is black, applied for the same entry-level position that Griffin held. The FDOC did not hire Smith, because he

---

precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

did not have a high school diploma or a general equivalency diploma (GED), a prerequisite for employment as a correctional officer. Smith later obtained a GED, but when he reapplied with the FDOC in July 1981, he failed the written entry-level correctional officer examination and was again denied the job.[8]

On July 28, 1982, the district court denied the defendants' motion to decertify the class and permitted Smith to intervene[9] because

---

[8] Smith never filed a timely charge of racial discrimination with the EEOC.

[9] In its dispositive order, the district court did not address the intervenor's complaint, which was filed with Griffin, Dejerinett, and Smith's joint motion for leave to allow Smith to intervene. Apparently, the court treated the intervenor's complaint as an amendment to Griffin and Dejerinett's complaint because it ordered that the "action shall continue to be certified as a class with PENERS L. GRIFFIN, HENRY L.

> Smith, [as] an unsuccessful applicant, certainly has an interest in this suit which seeks to challenge defendants' employment practices, including hiring. Unless he is permitted to intervene, his interest may not be adequately represented by the named parties. Mr. Smith eases this court's concern that the class claim against the [FDOC]'s objective criteria was not fairly and adequately protected by the named plaintiffs. Alvin Smith is a proper representative for potential black employees.

DEJERINETT, and ALVIN SMITH as named plaintiffs representing a class of all past, present, and potential black employees of the State of Florida Department of corrections."

As to the defendants' contention that Smith could not be a class representative because he had not timely filed an EEOC complaint, the district court found that the charges of discrimination Griffin had filed with the EEOC included "the hiring claim in addition to promotion, job classification, discipline, and termination claims." The court thus reasoned that the Fifth Circuit's single-filing rule excused Smith from having failed to exhaust his administrative remedies. See Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968))"[O]nce an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated....").

On July 30, 1982, the district court entered partial summary judgment

for the plaintiffs, including Griffin and Dejerinett, on the liability issue as to the written entry-level examination.[10] The court found that the FDOC examination "has a disparate impact upon class members which has not been justified by business necessity." The plaintiffs had sought summary judgment on two other issues -- the class hiring and promotion claims -- but the court denied summary judgment on those issues because they presented material issues of fact.

A trial was held over the five-week period beginning August 17 and ending September 17, 1982. The court entered judgment on August 25, 1983, disposing of the following issues in favor of the defendants: whether the FDOC's policies and practices discriminated against past,

---

[10] The district court said it would consider the issue of relief at trial.

present, and potential black employees; whether the FDOC's hiring practices as to Henry L. Dejerinett were racially discriminatory. The court entered judgment for the plaintiffs on the liability issue concerning the correctional officer examination, on which it had previously granted summary judgment for the plaintiffs.[11] The issue of relief for the class of black persons who took and failed the correctional officer written examination is still pending. The parties agreed that notice should be given to the affected members of the class and to seek interlocutory appeal of the district court's decision permitting

---

[11] The district court did not render judgment on Griffin's federal due process and equal protection claims or on his pendent state law claim for malicious prosecution (which was first raised in count III of Griffin's first amended complaint). Those claims are still pending in the district court.

Griffin, Dejerinett, and Smith to serve as named plaintffs for a class that included applicants with testing claims. We granted this appeal pursuant to 28 U.S.C. § 1292(b)(1982 & Supp. III 1985). Because we conclude that the district court's incorrectly applied the dictates of Falcon, we vacate the district court's order certifying the class.

II.

As with any private class action, the legitimacy of a private Title VII suit brought on behalf of a class depends upon the satisfaction of two distinct prerequisites. First, there must be an individual plaintiff with a cognizable claim, that is, an individual who has constitutional standing to raise the claim (or claims) and who has satisfied the procedural requirements of Title

VII.[12] Second, the requirements of Rule 23 of the Federal Rules of Civil Procedure must be fulfilled; in other words, the individual plaintiff must be qualified to represent the members of the class in accordance with the four prerequisites of Rule 23(a),[13] and the

---

[12] This circuit has held that the conditions precedent to filing a Title VII suit are not jurisdictional, but rather are akin to a statute of limitations. A plaintiff's failure to satisfy the conditions precedent does not, standing alone, deprive federal district courts of subject matter jurisdiction. Jackson v. Seaboard Coast Line R.R., 678 F.2d 992 (11th Cir. 1982). Nevertheless, "a plaintiff must generally allege in his complaint that 'all conditions precedent to the institution of the lawsuit have been fulfilled.'" Id. at 1010 (quoting Fed.R.Civ.P. 9(c)).

[13] Rule 23(a) provides as follows:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the

action must be one of the three types Rule 23(b) identifies.[14] We emphasize

---

claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[14] Rule 23(b) provides as follows:

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the

that any analysis of class certification must begin with the issue of standing and the procedural requirements of Title VII. Thus, the threshold question is whether the named plaintiffs have individual standing, in the constitutional sense, to raise certain issues. See Brown v. Sibley, 650 F.2d 760, 771 (5th Cir. Unit A July 1981)("This constitutional threshold must be met before any consideration of the typicality of claims or common-

---

members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

ality of issues required for procedural reasons by Fed.R.Civ.P. 23"). Only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others. See generally 2A. Larson & L. Larson, Employment discrimination §§ 49.50-.51 (1986 & Supp. Nov. 1986).

A.

Under elementary principles of standing, a plaintiff must allege and show that he personally suffered injury. See Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 898 (5th Cir. ("To meet the requirement for standing under Article III, a plaintiff must establish either that the asserted injury was in fact the consequence of the defendant's action or

that the prospective relief will remove the harm.")(citation omitted), cert denied, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978); Thurston v. Dekle, 531 F.2d 1264, 1269 (5th Cir. 1976)("The threshold case-or-controversy inquiry is whether there existed a named plaintiff with standing to raise the issue before the court."), vacated on other grounds, 438 U.S. 901, 98 S.Ct. 3118, 57 L.Ed.2d 1144 (1978). If he cannot show personal injury, then no article III case or controversy exists, and a federal court is powerless to hear his grievance. This individual injury requirement is not met by alleging "that injury has been suffered by other, unidentified members of the class to which [the plaintiff] belong[s] and which [he] purport[s] to represent." Warth v. Seldin, 422 U.S. 490, 502, 95 S.Ct. 2197, 2207, 45 L.Ed.2d

343 (1975); see also Minority Police Officers Assoc. v. City of South Bend, 721 F.2d 197, 202 (7th Cir. 1983)("Feelings of solidarity do not confer standing to sue."). Thus, a plaintiff cannot include class action allegations in a complaint and expect to be relieved of personally meeting the requirements of constitutional standing, "even if the persons described in the class definition would have standing themselves to sue." Brown v. Sibley, 650 F.2d 760, 771 (5th Cir. Unit A July 1981); see also Vuyanich v. Republic Nat'l Bank, 723 F.2d 1195, 1200 (5th Cir.), cert denied, 469 U.S. 1073, 105 S.Ct. 567, 83 L.Ed.2d 507 (1984). A named plaintiff in a class action who cannot establish the requisite case or controversy between himself and the defendants simply cannot seek relief for anyone -- not for himself, and not

for any other member of the class. O'Shea v. Littleton, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974). Moreover, it is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to just one of many claims he wishes to assert. Rather, each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim. This relationship between standing and the class action has been discussed in some detail by the Supreme Court:

> It is not enough that the conduct of which the plaintiff complains will injury someone. The complaining party must also show that he is within the

> class of persons who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject.

Blum v. Yaretsky, 457 U.S. 991, 999, 102 S.Ct. 2777, 2783, 73 L.Ed.2d 534 (1982)(citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166-67, 92 S.Ct. 1965, 1968-69, 32 L.Ed.2d 627 (1972)).

In the case before us, the named plaintiff who initiated the action, Peners L. Griffin,[15] could, and did, allege injury as a result of the FDOC's

---

[15] Our analysis of the standing and Rule 23 issues presented by this case focuses first on Peners L. Griffin as a sole named plaintiff. We then examine whether the addition of Henry L. Dejerinett and Alvin Smith as named plaintiffs affected the class certification.

discipline and promotion practices: he claimed that on specific occasions the FDOC illegally disciplined him and did not promote him, because of his race.[16] Griffin had standing to assert discipline and promotion claims. Because he had already met the educational and testing requirements of a road prison correctional officer and had been hired for that position, however, he suffered no injury as a result of the FDOC's use of the written entry-level examination. See Payne v. Travenol Laboratories, Inc., 565 F.2d 895, 898 (5th Cir.)"[Named p]laintiffs ... possessed tenth grade educa-

---

[16] Griffin satisfied the procedural requirements of Title VII, such as filing an EEOC complaint against his employer within 180 days of the alleged discrimination, see 42 U.S.C. § 2000e-5(c)(1976), and receiving statutory notice of the right to sue his employer, see 42 U.S.C. § 2000c-5(f)(1). See generally 42 U.S.C. § 2000e-5(detailing conditions precedent to a Title VII action).

tions and therefore lacked [constitutional] standing" to challenge tenth grade educational requirement), cert. denied, 439 U.S. 835, 99 S.Ct. 118, 58 L.Ed.2d 131 (1978). Griffin thus lacked constitutional standing to assert a testing claim.[17]

---

[17] Griffin's complaint alleged that the FDOC had implemented policies and practices of discrimination, including "maintaining a racially biased working environment" and "failing or refusing to recruit, hire,and assign blacks on the same basis as whites." Nothing in the complaint, in the district court's certification orders, or in the record on appeal alleged or established a causal link between the FDOC's allegedly discriminatory testing policy and its allegedly discriminatory work environment or its allegedly discriminatory promotion and discipline practices. Nor is there an allegation or showing in the record that Griffin (or Dejerinett, who was a clerk employed by the FDOC) suffered any specific harm resulting from the allegedly discriminatory work environment. Thus Griffin (and Dejerinett) did not establish standing to challenge the FDOC's testing practices. Cf. Gray v. Greyhound Lines, 545 F.2d 169, 173-75 (D.C. Cir. 1976), cited with approval in Meritor Savings Bank v. Vinson, ____ U.S. ____, ____, 106 S.Ct. 2399, 2405, 91 L.Ed.2d 49

Accordingly, we hold that the district court erred when it permitted Griffin to raise the testing claim on

---

(1986).

Assuming, for the sake of argument, that Griffin (or Dejerinett) had established standing to assert a testing claim, we nevertheless believe that under General Tel. Co. v. Falcon, 457 U.S. 147 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), the court should not have presumptively held that Griffin satisfied the requirements of Rule 23(a) so as to allow him to represent a class of applicants with testing claims. Griffin's complaint provided "an insufficient basis for concluding that the adjudication of his claim of [a racially discriminatory environment] would require the decision of any common question concerning the failure of [the FDOC] to hire more [black correctional officers]." See Falcon, 457 U.S. at 158, 102 S.Ct. at 2371. The record does not identify any questions of law or fact that were common to Griffin's claim of a racially biased working environment and the claims of those who failed the written entry-level correctional officer examination and were not hired. Thus, even if Griffin had standing to litigate his right to a work environment untainted by racial discrimination, he could not, on that basis, represent those with testing claims, because he did not satisfy the requirements of Rule 23(a).

behalf of himself and on behalf of others. We hold in the alternative that even if Griffin somehow had constitutional standing to assert the testing claim, he did not, in light of General Tel. Co. v. Falcon, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), have representative capacity to assert the testing claim on behalf of those who took the FDOC's written entry-level examination, failed it, and were not hired.[18] In other words, Griffin did not meet the prerequisites of Rule 23(a). We now turn to a discussion of Rule 23(a) and the Supreme Court's interpretation of it in Falcon.

---

[18] In Falcon, the Supreme Court granted certiorari for the express purpose of discussing the contours of Rule 23(a). Falcon, 457 U.S. at 155, 102 S.Ct. at 2369. The Court did not question, in its opinion, whether the named plaintiff had constitutional standing.

policies and practices. See e.g., Gibson v. Local 40 Int'l Longshoremen's & Warehousemen's Union, 543 F.2d 1259 (9th Cir. 1976); Senter v. General Motors Corp., 532 F.2d 511 (6th Cir.), cert. denied, 429 U.S. 870, 97 S.Ct. 182, 50 L.Ed.2d 150 (1976); Rich v. Martin Marietta Corp., 522 F.2d 333 (10th Cir. 1975); Barnett v. W.T. Grant Co., 518 F.2d 543 (4th Cir. 1975); Reed v. Arlington Hotel Co., 476 F.2d 721 (8th Cir.), cert. denied, 414 U.S. 854, 94 S.Ct. 153, 38 L.Ed.2d 103 (1973).[19]

---

[19] Although widely accepted, the across-the-board theory was not universally endorsed. See, e.g., Taylor v. Safeway Stores, Inc., 524 F.2d 263, 270-71 (10th Cir. 1975); Kinsey v. Legg, Mason & Co., 60 F.R.D. 91 (D.D.C. 1973), rev'd sub nom on other grounds, 557 F.2d 830 (D.C. Cir. 1977); White v. Gates Rubber Co., 53 F.R.D. 412 (D. Colo. 1971); Gresham v. Ford Motor Co., 53 F.R.D. 105 (N.D. Ga. 1970); Hyatt v. United Aircraft Corp., 50 F.R.D. 242 (D. Conn. 1970). Moreover, one of the members of the Fifth Circuit panel that first announced the across-the-board

The Supreme Court repudiated that liberal reading of the class action, and the reasoning underlying it, in General Tel. Co. v. Falcon, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982).[20] In

---

approach, Judge Godbold, cautioned in a specially concurring opinion that the approach announced in the majority's opinion was not a replacement for precise pleadings that allow district courts to determine whether the requirements of Rule 23(a) have been satisfied. See Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125-27 (5th Cir. 1969) (Godbold, J., specially concurring). Judge Godbold also observed that "an over-broad framing of the class" may be unfair and harmful to the absent class members: "what of the catastrophic consequences if the plaintiff loses and carries the [over-broad] class down with him, or proves only such limited facts that no practice or policy can be found, leaving him afloat but sinking the class?" Id. at 1126. Thirteen years later, the Supreme Court favorably discussed Judge Godbold's opinion when it rejected the across-the board approach. See General Tel. Co. v. Falcon, 457 U.S. 147, 160-61, 102 S.Ct. 2364, 2372, 72 L.Ed.2d 740 (1982).

[20] Even before Falcon, the across-the-board approach was placed in doubt by the Supreme Court. In East Texas Motor Freight Sys. Inc. v. Rodriquez, 431 U.S.

allegations quite similar to those made in Griffin's initial complaint, the named plaintiff in Falcon claimed that his employer had denied him promotions because he was a Mexican-American. He also alleged class claims on behalf of all Mexican-American employees of the company who had not been promoted, and all Mexican-American applicants who had not

---

395, 405-06, 97 S.Ct. 1891, 1898, 52 L.Ed.2d 453 (1977), the Court reversed a broad class certification:

> We are not unaware that suits alleging racial or ethnic discrimination are often by their very nature class suits, involving classwide wrongs. Common questions of law or fact are typically present. But careful attention to the requirements of Fed. Rule Civ. Proc. 23 remains nonetheless indispensable. The mere fact that a complaint alleges racial or ethnic discrimination does not in itself ensure that the party who has brought the lawsuit will be an adequate representative of those who may have been the real victims of that discrimination.

been hired. Without holding an evidentiary hearing, the district court certified a class consisting of those employees and applicants at one of the company's facilities. After a trial, the district court found that the employer had not discriminated against the named plaintiff in hiring, but did discriminate against him in its promotion practices. As to the class claims, the court reached the converse conclusion, finding no discrimination in promotion practices, but finding the hiring practices unlawfully discriminatory. On appeal, the Fifth Circuit, using the across-the-board approach, upheld the class certification:

> [The across-the-board rule] permits an employee complaining of one employment practice to represent another complaining of another practice, if the

> plaintiff and the members of the class suffer from essentially the same injury. In this case, all of the claims are based on discrimination because of national origin.

Falcon v. General Tel. Co., 626 F.2d 369, 375 (5th Cir. 1980).

The Supreme Court, on certiorari, began its analysis of the case by reiterating that Title VII does not relieve a private party plaintiff seeking to represent others from meeting the requirements of the class action rule:[21] "An individual litigant seeking to maintain a class action under Title VII must meet 'the prerequisites of numer-

---

[21] In contrast, under Title VII, the EEOC may seek relief for groups of employees or applicants without having to comply with the requirements of Rule 23. General Tel. Co. v. EEOC, 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980).

osity, commonality, typicality, and adequacy of representation' specified in Rule 23(a). These requirements effectively limit the class claims to those fairly encompassed by the named plaintiff's claims.'" General Tel. Co.. v. Falcon, 457 U.S. 147, 156, 102 S.Ct. 2364, 2369-70, 72 L.Ed.2d 740 (1982)(citations omitted). Although the Court recognized "that racial discrimination is by definition class discrimination," it said that the mere allegation of racial discrimination cannot answer the questions posed by Rule 23(a) or define the class that may be certified:

> Conceptually, there is a wide gap between (a) an individual's claim that he has been denied a promotion on discriminatory grounds, and his otherwise unsupported allegation tnat the

> company has a policy of discrimination, and (b) the existence of a class of persons who have suffered the same injury as that individual, such that the individual's claim and the class claims will share common questions of law or fact and that the individual's claim will be typical of the class claims.

Falcon, 457 U.S. at 157, 102 S.Ct. at 2370 (footnote omitted). Thus, evidence that an employee was denied a promotion because of illegal considerations of race will not necessarily justify the additional inference, for example, that the employer has adopted a general policy of racial discrimination that is reflected in the employer's other employment practices, such as hiring and testing. See

Falcon, 457 U.S. at 158, 102 S.Ct. at 2371. The presumption that general class claims are fairly encompassed within the personal claims of a named plaintiff can, at best, be characterized as tenuous. Id. The Falcon Court held that "actual, not presumed, conformance with Rule 23(a) [is] indispensable." Falcon, 457 U.S. at 160, 102 S.Ct. at 2372. This means that a private Title VII class action "may only be certified if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied." Falcon, 457 U.S. at 161, 102 S.Ct. at 2372.

The district court's error in Falcon can be traced to the named plaintiff's complaint, which "provided an insufficient basis for concluding that the adjudication of his claim of discrimination in promotion would require the

decision of a common question concerning the failure of petitioner to hire more Mexican-Americans." Id. at 158, 102 S.Ct. at 2371. Without the benefit of sufficiently specific pleadings or of a hearing that probed beyond the pleadings to answer the required certification questions, see id. at 160, 102 S.Ct. at 2372, the district court could do nothing but presume that the named plaintiff's individual promotion claim was typical of other claims that Mexican-American employees and applicants might raise. Id. at 158-59, 102 S.Ct. at 2371. In short, a district court must have some way of identifying the questions of law or fact that are common to claims of the named plaintiff and of the class members he seeks to represent. Id.

The Supreme Court has thus repudiated the across-the board theory of

Title VII class actions.[22] No longer will one allegation of specific discriminatory treatment be sufficient to sustain a company-wide class action.[23] No longer will an employee complaining of racial discrimination, for example, in one employment practice necessarily be permitted to represent other employees complaining of racial discrimination in

---

22 "Although Falcon does not eliminate broad-based class actions per se, it will be a rare situation indeed that will permit the combining of hiring, promotion, and discharge claims in the same class." 2 A. Larson & L. Larson, Employment Discrimination § 49.52(c)(2) (1986).

23 In Falcon, 457 U.S. at 159, 102 S.Ct. 2371 (footnote omitted), the Court stated as follows:

> "If one allegation of specific discriminatory treatment were sufficient to support an across-the-board attack, every Title VII case would be a potential company-wide class action. We find nothing in the statute to indicate that Congress intended to authorize such a wholesale expansion of class-action litigation.

other practices. District courts must not presume that a named plaintiff has satisfied the typicality and commonality requirements of Rule 23(a). In practical terms, this means that, as a general rule, incumbent employees cannot represent a class that includes applicants and that even a general policy of discrimination will not justify a class of both applicants and employees. See Falcon, 457 U.S. at 158-59 & n.15, 102 S.Ct. at 2371 & n.15.

In footnote fifteen of Falcon, the Supreme Court identified exceptions to that general rule. For example, an employee who alleges that he was a victim of a specific discriminatory employment practice may properly represent applicants when the employer used a biased testing procedure to evaluate both applicants and incumbent employees: "a

class action on behalf of every applicant or employee who might have been prejudiced by the test clearly would satisfy the commonality and typicality requirements of Rule 23(a)." Falcon, 457 U.S. at 159, n.15, 102 S.Ct. at 2371 n.15. In addition, a general policy of discrimination could justify a class of both applicants and employees "if the discrimination manifested itself in hiring and promotion practices in the same general fashion, such as through entirely subjective decisionmaking processes." Id.

The situations the Supreme Court identified in footnote fifteen can be thought of as exceptions to the general rule that applicants and incumbent employees cannot share the same class. We emphasize, however, that those situations are exceptions not because

racial discrimination is by definition class discrimination, a necessarily valid proposition underlying the across-the-board rule, Falcon, 457 U.S. at 157, 102 S.Ct. at 2370, but because the commonality and typicality requirements of Rule 23(a) can be satisfied.[24] If, after a rigorous analysis, a district court is satisfied that in a case similar to those situations described in footnote fifteen the Rule 23(a) requirements have been met, then it should not hesitate to

---

[24] See I H. Newberg, Newberg On Class Actions § 3.17 (2d ed. 1985):

> In the final analysis, through its rulings and examples, Falcon instructs that the Rule 23(a) typicality requirement can be satisfied only by a showing of a sufficient interrelationship between the claims of the representative and those of the class, so that an adjudication of the individual claims will necessarily involve the decision of common questions affecting the class.

certify the class. We caution, however, that although district courts should give real meaning to Falcon's footnote fifteen, that footnote should not be used to defeat the general dictates of Falcon. The footnote was not meant to sanction broad class actions that otherwise do not conform to Rule 23(a).

c.

We begin our analysis of whether the requirements of Rule 23(a) have been fulfilled in the case before us by examining Griffin's complaint.[25] The complaint, which was filed in October 1979, almost three years before Falcon was decided, included allegations that the defendants discriminated on the basis

---

[25] Our analysis takes into account that the district court had considerable discretion in deciding to certify the class. See e.g., Walker v. Jim Dandy Co., 747 F.2d 1360, 1363 (11th Cir. 1984); Freeman v. Motor Convoy, Inc., 700 F.2d 1339, 1347 (11th Cir. 1983).

of race with their written entry-level examinations and in their hiring, assignment, discipline, and promotion decisions. Griffin's action was brought "on behalf of all past, present and potential black American citizens and residents who have been, are or may be employees of the Defendants or applicants for employment." As to Rule 23(a)'s numerosity requirement the complaint contains the allegation that the persons in the class "are too numerous to join in this action."[26] The only reference to

---

[26] In his second amended complaint, Griffin made the following numerosity allegation:

> The precise total number of persons in the class is unknown to the Plaintiffs. Plaintiffs allege, on information and belief, that there are more than 1,000 persons in this class. There are many other unknown class members. They are too numerous to join a named Plaintiffs and such joinder is impractical.

Griffin's ability to represent that class was this statement: "The Plaintiff can fairly and adequately represent the class." The complaint's only reference to Rule 23(a)'s commonality requirement was this statement: "The conclusory questions of whether there is a general pattern and practice of discrimination by Defendants and the question of whether certain practices constitute illegal job discrimination are common mixed questions of fact and law to the class as a whole." The complaint made no allegation whatsoever that Griffin could meet Rule 23(a)'s additional requirement of typicality.[27]

Without an evidentiary hearing, the district court preliminarily certified

---

[27] The first reference to Rule 23(a)'s typicality requirement was in Griffin's second amended complaint, in which he alleged that "the claim of the Plaintiffs are typical of the claims of another class members."

the "class of all past, present, and potential black employees" of the FDOC, finding that the requirements of Rule 23(a) had been met. The court's certification ruling was based solely on a stipulation of the parties that under the law of the Fifth Circuit, the named plaintiffs met the commonality requirement of Rule 23(a).[28] The parties further stipulated that "[t]he claims of the named plaintiffs are, under current law in the United States of Appeals, Fifth Circuit, similar to those of other members of the proposed class."[29] The parties made no relevant factual stipulations.

Soon after the Supreme Court decided Falcon, the defendants moved the district

---

[28] See supra note 6.

[29] The defendants reserved the right to move the district court to decertify the class. See supra note 6.

court to vacate the order certifying the class. The parties filed memorandum of law, arguing the applicability of Falcon. On the basis of the memoranda, and with no hearing, the district court issued an order denying the defendants' motion. The court's analysis began with the recognition that "[t]he Falcon decision mandates that this court carefully examine the requirements of Rule 23(a)."[30] As to the commonality requirement, the district court found the following:

> Plaintiffs have alleged a common practice and pattern of

---

[30] As to the first requirement of Rule 23(a) -- "the class is so numerous that joinder of all members is impracticable" -- the district court found that "[t]he number of black persons employed by the [FDOC] in February 1981 was 1,346.... This number alone, without inquiry as to the number of past and potential black employees, clearly indicates that the class members are too numerous to join."

racial discrimination which affects defendants' hiring, promotion, job classification, disciplinary, and termination decisions. This general discriminatory policy commonly injures all members of the class of past, present, and potential black employees of the Department. Plaintiffs maintain that they will utilize similar statistical data, similar historical background, and the same or similar witnesses to support their allegations of class-wide discrimination. This court is satisfied that the commonality requirement of Rule 23 is met.

The district court found the typicality prerequisite satisfied, but

only because Henry L. Dejerinett, a black male who was not hired for a clerical position, had been added as a party-plaintiff and as a class representative. Even so, the court was concerned that Griffin and Dejerinett could not adequately represent those with objective testing claims:

> Plaintiff Griffin certainly can adequately protect the interests of black employees who have claims of discrimination in promotions, job classification, discipline, and terminations. Plaintiff Dejerinett's claim is somewhat interrelated with the class claims of a discriminatory hiring police. Plaintiffs allege that blacks are not hired in sufficient number because of facially

neutral objective criteria, i.e., a high school education requirement and the [FDOC] test, which have a disparate impact on black applicants and of a subjective barrier which causes the almost exclusively white decisionmakers to discriminate against black applicants. The class claim against discriminatory subjective hiring decisions is fairly encompassed in Dejerinett's claim. This court, however, is concerned that the class claim against the Department's objective screening criteria which have a disparate impact upon class members, especially the [FDOC] test, is not fairly and adequately protected by any

of the named plaintiffs.

In that same order, the district court permitted Alvin Smith to intervene as a party plaintiff. Smith was an unsuccessful black applicant for a correctional officer position who had failed the written entry-level correctional officer examination. The court wrote the following in its order: "Mr. Smith eases this court's concern that the class claim against the Department's objective criteria was not fairly and adequately protected by the named plaintiffs. Alvin Smith is a proper representative for potential black employees."

As to Griffin's capacity to represent the "class of all past, present, and potential black employees" of the FDOC, we hold that, in light of Falcon, Griffin's complaint provided an insufficient basis by which the district court

could have concluded that Griffin's "claim[s] of discrimination in promotion [and discipline] would require the decision of any common question concerning the failure of [the defendants] to hire more [blacks]." Falcon, 457 U.S. at 158, 102 S.Ct. at 2371. In our view, Griffin satisfied neither the commonality nor the typicality requirements of Rule 23(a).[31]

The district court found the commonality requirement satisfied because

---

[31] As the Supreme Court noted in Falcon, 457 U.S. at 157 n.13, 102 S.Ct. at 2370 n.13,

> [t]he commonality and typicality requirements of Rule 23(a) tend to merge. Both serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.

the "general discriminatory policy" Griffin alleged "commonly injures all members of the class" and that in order "to support their allegations of class-wide discrimination," Griffin would utilize "similar statistical data, similar historical background, and the same or similar witnesses." As to the typicality requirement, the district court found it satisfied because "[p]laintiffs allege that blacks are not hired in sufficient number because of facially neutral objective criteria, i.e., a high school education requirement and the [FDOC] test, which have a disparate impact on black applicants and of a subjective barrier which causes the almost exclusively white decisionmakers to discriminate against black applicants."

To us, the district court failed to appreciate the significance of Falcon. The district court did not engage in the kind of "rigorous analysis" that we believe the Falcon court contemplated. See Falcon, 457 U.S. at 161, 102 S.Ct. at 2372.

Griffin's initial complaint, relying on the then-valid across-the-board rule, made no factual showing to satisfy the Rule 23(a) requirements. Additionally, the two amended complaints, which included Dejerinett and Smith as named plaintiffs, offered no facts to satisfy the Rule 23(a) requirements. Moreover, the named plaintiffs' "Memorandum in Opposition to Motion to Vacate Order Certifying Class" offered little more than conclusory statements that the named plaintiffs satisfied the Rule 23(a) criteria. See Nelson v. United States

Steel Corp., 709 F.2d 675, 680 (11th Cir. 1983)("[Named plaintiff] was ... obligated to show, in at least a preliminary fashion, the required commonality between her claims and those of the putative class.") (citations omitted). Although the plaintiffs asserted that "[w]hether a person impacted by one employment practice may represent other persons impacted 'in the same manner' by another practice need not be reached in this case," they nonetheless tried to take refuge in Falcon's footnote fifteen, which states that a class of both applicants and employees could be justified "if the discrimination manifested itself in hiring and promotion practices in the same general fashion." Falcon, 457 U.S. at 159 n.15, 102 S.Ct. at 2371 n.15. This is the closest the named plaintiffs came to helping the district court con-

duct a rigorous Rule 23 inquiry. In fact, the plaintiffs, although aware of Falcon, continued to rely on the defunct across-the-board rule by citing a former Fifth Circuit case[32] that, in light of

---

[32] In support of its typicality argument, the plaintiffs' memorandum of law cited Herbert v. Monsanto Co., 576 F.2d 77, 88 (5th Cir.), vacated and dismissed for want of jurisdiction, 580 F.2d 178 (5th Cir. 1978)(per curiam):

> Appellee contends that because appellant's claim concerns only the trucking activities of the company and other claimants are from different departments, appellant's claim is neither factually nor legally typical. We recognize, however, that the typicality requirement is not so rigid as to comprehend only similar fact situations. If class actions were limited to factual typicality, class actions under Title VII would be impossible because, except in rare cases, the facts would not be identical. It would be a better test for typicality to consider whether the types of facts or evidence were typical of the class. For example, if all claims, although of different job classifications, depended upon statistical

Falcon, was no longer good law.

The district court's commonality analysis amounts to nothing more than a presumption that racial discrimination as manifested in various employment practices raises a common question of law or fact. See Wheeler v. City of Columbus, 703 F.2d 853, 855 (5th Cir. 1983)(per curiam)("Discrimination in its broadest sense is the only question alleged that is common to [the named plaintiff] and the class she sought to create and represent. Under Falcon this is not

---

> evidence, and the statistics evidenced a policy of discrimination, typicality would be satisfied.

In light of Falcon, "general statistical evidence of underrepresentation in the workforce will undoubtedly not suffice to justify a single class covering different types of discrimination such as in hiring promotion, and discharge." 2 A. Larson & L. Larson, Employment Discrimination § 49.52(c)(2) (1986)(interpreting footnote 15 of Falcon, 457 U.s. at 159, 102 S.Ct. at 2371.

enough."). The district court's typicality analysis, which presumably is based on Falcon's footnote fifteen, is flawed. As we have already discussed, in that footnote the Falcon Court identified exceptions to the general rule that employees cannot represent a class that includes applicants, even though the employer's discrimination is manifested in various employment practices. One situation that may justify a class of both applicants and employees is when the discrimination that is manifested in various practices is effected "in the same general fashion, such as through entirely subjective decisionmaking processes." Falcon, 457 U.S. at 159 n.15, 102 S.Ct. at 2371 n.15. The named plaintiffs' assertions notwithstanding, the pleadings demonstrated that any general policy of discrimination that the

FDOC may have had did not manifest itself in the same general fashion.

When the Supreme Court used the term "same general fashion," it gave an example: "entirely subjective decision-making processes." Significant proof that an employer makes both discriminatory hiring and promotion decisions using an entirely subjective decisionmaking process for each employment practice is a manifestation of a general policy of discrimination operating in "the same general fashion." By qualifying "subjective decisionmaking processes" with "entirely," the Court implied that an employer's general policy of discrimination manifested, for example, by an objective hiring practice and by a subjective promotion practice would not be discrimination operating in "the same general fashion" sufficient to justify a

class of both applicants and employees.

The FDOC's decisionmaking process for hiring correctional officers is objective: applicants must hold a high school diploma or a general equivalency diploma and must pass the written correctional officer examination. In contrast, the FDOC's decisionmaking process for promoting correctional officers, and other employees, is subjective: applicants for promotion need not hold advanced degrees or pass any additional examinations; correctional officers are promoted on the basis of their performance as viewed by their superiors. The case before us is not one that implicates Falcon's footnote fifteen.

We therefore hold that Griffin, an incumbent correctional officer complaining of a subjective decisionmaking pro-

cess, could not represent a class that included those who may have been victims of a discriminatory objective decision-making process, such as applicants for the position of correctional officer who took the written entry-level examination and failed it. See e.g., Walker v. Jim Dandy Co., 747 F.2d 136, 1365 (11th Cir. 1984)("Following Falcon ... we hold that [plaintiffs'] complaint provided an insufficient basis for concluding that the adjudication of [their] claim of discrimination in hiring supervisory employees would require the resolution of common questions of law and fact concerning [the employer's] discriminatory practices in recruitment, job assignment, transfer, and promotion."); Redditt v. Mississippi Extended Care Centers, Inc., 718 F.2d 1381, 1387 (5th Cir. 1983) ("Under Falcon, plaintiff cannot serve as

class representative with respect to hiring, promotion, or any other employment practices excepting discriminatory discharge because she does not possess the same interest and did not suffer the same injury as the other members of the class."); Taylor v. Block, 35 Fed.R. Serv.2d (Callagham) 546 (D.D.C. Oct. 15, 1982)(plaintiffs who alleged they suffered only promotion discrimination could not represent across-the-board class claiming hiring, assignment, and training discrimination). In other words, Griffin, who could assert discipline and promotion claims under Title VII, did not have representative capacity, within the meaning of Rule 23(a), to assert testing claims on behalf of others.[33] We now

---

[33] Because Griffin satisfied neither the commonalty nor the typicality requirements of Rule 23(a), we need not address whether he could have been an adequate representative of the class.

examine whether the addition of Henry L. Dejerinett and Alvin Smith as named plaintiffs affected the class certification question.

III.

Eight months after filing his complaint in district court, Griffin sought leave to amend his complaint to add Henry L. Dejerinett as a party-plaintiff and as a class representative. In November 1978, Dejerinett applied for an FDOC clerical position, entitled "Property Manager III." Dejerinett was not required, as part of the application process, to produce an educational degree or to take the written entry-level examination required of correctional officer applicants. He was required, however, to have an interview. Dejerinett was not hired; instead, the FDOC hired a white

---

See Fed.R.Civ. P. 23(a)(4).

male. A month later, Dejerinett filed a charge of racial discrimination against the FDOC with the Florida Commission on Human Relations, a deferral agency for the EEOC. He requested and received a right-to-sue letter from the EEOC in April 1980. The district court, with no written analysis of standing or Rule 23, granted Griffin leave to amend his complaint and add Dejerinett as a named plaintiff.

Dejerinett had standing to assert a subjective hiring claim.[34] He applied

---

[34] There is some indication in the record that the Florida Department of Administration, on the basis of testing, training, and experience, rated Dejerinett as well-qualified for the clerk position. We cannot tell from the record whether any testing done by the Department of Administration measured health, physical ability, or intelligence. In any event, because the rating took experience and training into account, there was a substantial subjective component to the rating. We also note that because Dejerinett received a well-qualified rating (which presumably was a

for a clerical position, requiring no correctional officer examination or educational degrees, and was not hired. Because Dejerinett never took the correctional officer examination, and never applied for that position, he suffered no injury as a result of that test. He thus lacked constitutional standing to assert a testing or a hiring claim arising out of the FDOC's correctional officer application process.

Accordingly, we hold that the district court erred when it permitted Dejerinett to raise the testing claim on behalf of himself and on behalf of others. We hold in the alternative that even if Dejerinett somehow had constitutional standing to assert the testing

---

reason he was granted an interview), he did not allege that the Department of Administration's rating process illegally discriminated against black applicants.

claim, he did not, in light of General Tel. Co. v. Falcon, 457 U.S. 147, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982), have representative capacity to assert the testing claim on behalf of those who took the FDOC's written entry-level examination, failed it, and were not hired.[35] In other words, Dejerinett did not meet the prerequisites of Rule 23(a).

The district court, in effect, presumed the similarity of hiring claims of those denied clerical positions to hiring claims of those denied correctional officer positions. In our view, applicants who were subjectively denied clerical positions cannot sufficiently identify with other applicants who failed an objective written examination and, on that basis, were not hired for the higher-ranking position of correctional

---

35 See supra note 18.

officer. See Walker v. Jim Dandy Co., 747 F.2d 1360, 1364 (11th Cir. 1984)("The [district] court [correctly] reasoned that because [the plaintiffs] were applicants for supervisory positions, they did not sufficiently identify with other applicants for lower level labor jobs or employees complaining of disparate job assignments or pay.") The district court abused its discretion when, in light of Falcon, it continued to permit Dejerinett to represent those members of the class who took and failed the written entry-level correctional officer examination.

B.

Intervenor Alvin Smith twice applied for the entry-level correctional officer position held by Griffin. Smith was first denied the job because he did not have a high school diploma or a general equivalency diploma (GED), both require-

ments for the job. Later he obtained a GED, but he then failed the written correctional officer examination. Consequently, he was denied the position a second time.

Smith had constitutional standing to assert a testing claim under Title VII. He could, and did, allege injury as a result of the FDOC's testing requirement: he took and failed the written examination required of entry-level correctional officers. Although Smith may very well have had representative capacity, under Rule 23(a), to assert testing claims on behalf of other black applicants who failed the same test and were consequently not hired, we need not address that point. Smith did not file a timely charge of racial discrimination with the EEOC, a precondition to a Title VII suit. See 42 U.S.C. § 2000e-5(e)(1982); Jackson

v. Seaboard Coast Line R.R., 678 F.2d 992, 1010-11 (11th Cir. 1982); See also supra note 12. Furthermore, as we discuss below, Smith could not avail himself of the single-filing rule. For these reasons, we hold that the district court erred when it allowed Smith to intervene as a class representative.

In Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498-99 (5th Cir. 1968), our predecessor circuit held that it is not necessary for each person with the same grievance to file an EEOC charge as a prerequisite to class membership. Nor is it necessary that an intervenor bring a charge with the EEOC as a prerequisite to serving as a class representative. Id. As long as at least one named plaintiff timely filed an EEOC charge, the precondition to a Title VII action is met for all other named plaintiffs and

class members. Id.[36]

This rule, which has become known as the "single-filing rule," contains two essential requirements: "First, at least one plaintiff must have timely filed an EEOC complaint that is not otherwise defective.... Second, the individual claims of the filing and non-filing plaintiffs must have arisen out of similar discriminatory treatment in the same time frame." Jackson, 678 F.2d at 1011-12. In the case before us, the

---

[36] The Oatis reasoning was extended to intervention in non-class suits in Wheeler v. American Home Prods. Corp., 582 F.2d 891, 897-98 (5th Cir. 1977)(similarly situated intervenors who had not filed EEOC charges nevertheless could assert back pay claims if one or more of original plaintiffs had filed timely charges).

The Oatis rationale was further extended in Crawford v. United States Steel Corp., 660 F.2d 663, 665-66 (5th Cir. Unit B Nov. 1981), which held that every original plaintiff in a multi-plaintiff, non-class action suit need not file charges with the EEOC.

first requirement was met: Griffin, one of the named plaintiffs, timely filed an adequate EEOC complaint, as far as it detailed his promotion and discipline claims. The second requirement, however, was not satisfied. Smith, a non-filing plaintiff, had an objective testing claim while Griffin, on the other hand, had subjective promotion and discipline claims.

We hold that Griffin and Smith were not sufficiently similarly situated. That is, employee Griffin's claims and applicant Smith's claims did not arise out of similar discriminatory treatment. Griffin alleged that the FDOC's subjective promotion and discipline practices were illegally discriminatory. Smith alleged that the FDOC's objective correctional officer examination illegally discriminated against black applicants.

The FDOC's promotion and discipline practices were not manifested in similar fashion to its hiring and testing practices. See Ezell v. Mobile Housing Bd., 709 F.2d 1376, 1381 (11th Cir. 1983)(non-filing incumbent plaintiff's discriminatory examination claim was not sufficiently similar to filing plaintffs' discriminatory discharge and broad-based, on-going campaign of discrimination claims to invoke single-filing rule to excuse filing requirement); Dalton v. Employment Sec. Comm'n, 671 F.2d 835, 838 (4th Cir.), cert. denied, 459 U.S. 862, 103 S.Ct. 138, 74 L.Ed.2d 117 (1982)(because non-charging plaintiff's hiring claim was not "substantially identical" to incumbent employee's claims of discriminatory treatment, single-filing rule did not apply). Although both employment practices could have been

racially discriminatory, that alone is not enough to implicate the second requirement of the single-filing rule. Otherwise, "intervention [could] bootstrap the court's jurisdiction to encompass claims regarding practices broader that the ... claims properly assertable by the named plaintffs." Vuyanish v. Republic Nat'l Bank, 723 F.2d 1195, 1201 (5th Cir.)(former employees who sought to intervene in class action but who did not file timely charges with EEOC could only proceed within periphery of issues that named plaintffs could assert), cert. denied, 469 U.S. 1073, 105 S.Ct. 567, 83 L.Ed.2d 507 91984); see also Wakeen v. Hoffman House, Inc., 724 F.2d 1238, 1246 (7th Cir. 1983)("[A] class member who does not meet the procedural prerequisites for waging a Title VII suit may not

use the guise of a motion to intervene to take over as the sole class representative for someone who initiates but is not legitimately able to continue a class action.").

We also note that merely because a notation at the beginning of Griffin's EEOC complaint stated that Griffin's charge also encompassed "[s]incerity of recruiting, hiring, and promoting of minority groups within the Florida's Division of Adult Corrections," Smith's status as a class representative was not saved. As the pleadings make clear, Griffin never had constitutional standing to raise a testing or a hiring claim, a fundamental requirement underlying the single-filing rule: "once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the

class of persons similarly situated." Oatis, 398 F.2d at 498.[37] Smith cannot point to Griffin's EEOC charge, which arguably contained a testing claim brought on behalf of others, to excuse his failure to have filed his own testing charge with the EEOC when Griffin did not have standing to raise the testing issue. We cannot permit the single-filing rule to be used to circumvent the constitutional requirement of standing.

---

[37] By "standing," the Oatis court meant "the issues as to which [the employee] is aggrieved," Oatis, 398 F.2d at 499, citing Title VII's enforcement provision that requires the EEOC to investigate the charges of a person claiming to be aggrieved, 42 U.S.C. § 2000e-5(a). By "standing," the Oatis court also meant, even if implicitly, personal injury, that is, constitutional standing. See id., at 498-99; see also, Vuyanish v. Nat'l Bank, 723 F.2d 1195, 1200-01 (5th Cir.)(interpreting Oatis' single-filing rule as implicating constitutional standing cert. denied, 469 U.S. 1073, 105 S.Ct. 567, 83 L.Ed.2d 507 (1984).

IV.

In sum, based on standing principles and on the dictates of Falcon, we hold that the district court erred when it certified the class with the named plaintiffs as representatives. None of the named plaintiffs -- Griffin, Dejerinett, or Smith -- should have been allowed to represent the class of black correctional officer applicants with testing claims. The district court's order certifying the class is therefore

VACATED.

HATCHETT, Circuit Judge, dissenting:

I dissent. The majority holds that Smith did not meet the second element of the single-filing rule. That rule states, "the individual claims of the filing and non-filing plaintiffs must have arisen out of similar discriminatory treatment in the same time frame."

Jackson, 678 F.2d at 1011-12 (emphasis added). One of Griffin's claims in his EEOC complaint was that the FDOC discriminated against black job applicants. Non-filing intervenor Smith's claim arose "out of similar discriminatory treatment," because he alleges that the FDOC discriminated against him and other applicants through administration of a test with a discriminatory impact on blacks. The majority ignores the fact that Griffin raised the claim of discrimination against black applicants in his EEOC complaint.

The majority erroneously assumes that if Griffin lacks standing to raise the hiring claim in federal court, then his raising of that claim before the EEOC is somehow ineffective for purposes of the single-filing rule. The majority's reasoning is based upon its failure to

differentiate between the policy underlying the standing requirement in federal court and the policy underlying the single filing rule in an EEOC action. The policy underlying the standing requirement is to ensure that a party litigating an issue has a concrete stake in the outcome of the case, and is therefore motivated to vigorously litigate the issues. The policy underlying the EEOC filing requirement is to ensure "that the settlement of grievances be first attempted through the office of the EEOC...." Ezell v. Mobile Housing Board, 709 F.2d 1376, 1381 (11th Cir. 1983); Otis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 1968). The purpose underlying the EEOC filing requirement is therefore to promote the resolution of Title VII claims out of court. The EEOC proceeding is not

designed as a way-station on the road to the federal courthouse.

By asserting a hiring grievance in his EEOC complaint, Griffin ensured "that the settlement of [hiring] grievances [would] be first attempted through the office of the EEOC." Ezell, 709 F.2d at 1381. The fact that Griffin may not have had standing in federal district court to raise the hiring issue is irrelevant to the fact that his EEOC complaint gave the EEOC an opportunity to settle the hiring grievance before that grievance was sued upon in federal district court. Since Smith's claim in federal district court of discriminatory hiring practices is identical to the claim of discriminatory hiring practices asserted in Griffin's complaint before the EEOC, involving the single filing rule will not frustrate the purpose of the EEOC filing requirement:

to give the EEOC a chance to resolve Title VII claims before they go to court. The fact that Griffin may not have had standing to raise the hiring claim in court is irrelevant to the issue of whether the EEOC has had a chance to resolve that claim before it is taken to court, whether by Griffin, Smith, or anyone else.

In short, the majority has grafted the constitutional standing requirement for parties litigating in federal district court onto the filing requirements for persons alleging Title VII claims before the EEOC. Such a requirement does not, and never has, existed. The majority, however, misinterprets Fifth Circuit dicta to reach just that conclusion. That dicta says, "Once an aggrieved person raises a particular issue with the EEOC which he has standing

to raise, he may bring an action for himself and the class of persons similarly situated." Oatis, 398 F.2d at 498. The majority fails to mention that the sole issue in the Oatis case was whether a Title VII class action could include in the class persons who had not previously filed charges with the EEOC. The court held that the class could include such persons. The Oatis court gave its reasoning for this holding in the sentence immediately preceding the language relied upon by the majority in this case. That sentence states, "If it is impossible to reach a settlement with one discriminatee, what reason would there be to assume the next one would be successful." Oatis, 398 F.2d at 498. In short, the court in Oatis was not faced with the question of whether an EEOC complainant could effectively file claims with the

EEOC even though the complainant would not have standing to assert the claim in federal district court. The majority's application of constitutional standing requirements to the EEOC complainant puts the EEOC in the nonsensical position of having to anticipate how the federal district court will rule on the complainant's standing to litigate various claims if the EEOC does not resolve them. Such a rule will result in the EEOC narrowing its resolution of claims to those which it anticipates the complainant will have standing to sue upon in federal district court, regardless of the apparent existence of the alleged discrimination with respect to other employees or job applicants. Such a situation would hardly further the purpose of the EEOC filing requirement: to resolve Title VII claims out of court.

> Title 42 U.S.C. § 2000e-5(b) says: Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer ... has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge ... and shall make an investigation thereof.

This provision requires the Commission to investigate all charges which a person "claims" to be aggrieved of. In no way does the provision suggest that the Commission is limited to the investigation of claims which the complainant will have standing to bring in a federal court. Any suggestion in Oatis of such a requirement is dicta that is in conflict with the intent of the statute that the

EEOC resolve "claimed" discrimination out of court. Smith should therefore be allowed to proceed in federal district court as a class representative for the class of applicants who failed the objective test.

UNITED STATES COURT OF APPEALS
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

No. TCA 79-1016

Decided: March 12, 1981

PENERS L. GRIFFIN and HENRY L. DEJERINETT, both individually and on behalf of others similarly situated,

Plaintiffs,

v.

LOUIE L. WAINWRIGHT, et al.,

Defendants.

ORDER CERTIFYING CLASS

On the basis of the record in this case and the attached stipulation of the parties, which is hereby incorporated in this order as the findings of this court, the court finds that this action should be certified as a class action with the above-named plaintiffs representing a class of all past, present, and potential

black employees of the State of Florida Department of Corrections.

The court finds that the requirements of Federal Rule of Civil Procedure 23(b)(2) have been satisfied and that plaintiffs have met the requirements of Federal Rule of Civil Procedure 23(a). A decision on class certification is conditional and subject to modification at any time prior to a decision on the merits. See Fed.R.Civ.P. 23(c)(1); Jones v. Diamond, 519 F.2d 1090, 1098 (5th Cir. 1975).

Accordingly, it is ORDERED AND ADJUDGED

1. Plaintiffs' motion to certify the class (Document 16) is GRANTED and the court hereby certifies this case as an action on behalf of the following class: all past, present, and potential black employees of the State of Florida

Department of Corrections.

2. The class certification hearing schedule,d to take place on April 2, 1981 is hereby cancelled.

DONE AND ORDERED this 10th day of March, 1981.

s/s William Stafford
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

No. TCA 79-1016

Decided:

PENERS L. GRIFFIN and HENRY L. DEJERINETT, etc.,

Plaintiffs,

v.

LOUIE L. WAINWRIGHT, etc., et al.,

Defendants.

STIPULATION

The Plaintiffs and Defendants, by and through their undersigned counsel, for the purpose of permitting the Court to determine preliminarily whether this action shall be maintained as a class action and for no other purpose, stipulate and agree as follows:

1. The number of persons in the proposed class of all past, Present and potential black employees of the State of Florida Department of Corrections is greater than 1,000.

2. The allegations of race discrimination in the Second Amended Complaint involve questions of law and fact which, under current law in the United Stares Court of Appeals, Fifth Circuit, are common to the class, including statistical evidence, evidence concerning the employment system of the State of Florida Department of Corrections, and the common legal principles applied to claims of race discrimination. The parties maintain their right to brief these issues on appeal, if any.

3. Plaintiffs' counsel are competent to prosecute this action as a class action. The named plaintiffs are

willing and able to prosecute this action on behalf of the class. The parties reserve the right to present evidence and argument, at trial or at the hearing of any motion filed pursuant to paragraph "7" of this Stipulation, concerning the allegation that the Plaintiff Griffin withdrew his first charge of discrimination.

4. The claims of the named plaintiffs are, under current law in the United States Court of Appeals, Fifth Circuit, similar to those of other members of the proposed class. The parties maintain their right to brief these issues on appeal, if any. The Defendants believe that the employment record of the Plaintiff Griffin is not typical, but recognize that this issue relates to the merits of the claim rather than to the existence of the claim. The

Defendants further believe that the claims of the Plaintiff Dejerinett are typical only of claims concerning employment at the Central Office of the Department of Corrections.

5. The Defendants reserve all defenses alleged in their amended answer to the second amended complaint, except their response, stated in their Eleventh Defense, to paragraphs numbered "8", "9", "10", and "11" of the second amended complaint. A response to those paragraphs may be reasserted if the Defendants move pursuant to paragraph "7" of this Stipulation.

6. The parties do not agree as to the appropriate dates which begin the periods of potential liability in this action and reserve the right to present evidence and argument on this issue.

7. In the event that this action is preliminarily certified by the court as a class action, the parties reserve the right to move to decertify or limit the class, or to establish sub-classes, at any time during the pendency of this litigation.

8. The parties recognize that this Stipulation may be used by the court as a basis upon which to enter an order preliminarily certifying this action as a class action. The parties reserve the right to present evidence and argument concerning the appropriateness, vel non, and scope of the class at trial.

9. This Stipulation and the proposed class pertain only to the claims of employment discrimination and not to the other claims alleged in the second amended complaint.

s/s MITCHELL D. FRANKS
MITCHELL D. FRANKS
Assistant Attorney General
Department of Legal Affairs
The Capitol, Suite 1501
Tallahassee, Florida 32301
(904) 488-1573

COUNSEL FOR DEFENDANTS

s/s HARRY L. WITTE
HARRY L. WITTE
Attorney at Law
1215 Thomasville Road
Post Office Box 4289
Tallahassee, Florida 32303
(904) 244-9184

PATTERSON G. TRAYNHAM
Patterson & Traynham
Attorneys at Law
1215 Thomasville Road
Post Office Box 4289
Tallahassee, Florida 32303
(904) 224-9181

s/s BRIAN E. NORTON
BRIAN E. NORTON
Attorney at Law
117 S. Martin Luther King
Boulevard
Tallahassee, Florida 32301
(904) 224-8701

PAUL A. LEHRMAN
Attorney at Law
103 N. Gadsden Street
Tallahassee, Florida 32302
(904) 224-8687

COUNSEL FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

No. TCA 79-1016

Decided: July 30, 1982

PENERS L. GRIFFIN, et al., etc.,

Plaintiffs,

v.

LOUIE L. WAINWRIGHT, et al., etc.,

Defendants.

ORDER

The above-styled cause is a civil rights suit brought pursuant to 42 U.S.C. §§ 1981 and 2000e alleging discriminatory employment practices based on race. This court, by order dated March 10, 1981 (Document 84) and on the basis of a stipulation filed by the parties, certified this action as a class action with Peners L. Griffin and Henry L.

Dejerinett representing a class of all past, present, and potential black employees of the State of Florida Department of Corrections. The parties have litigated this action as an across--the-board discrimination claim with discovery covering the realm of employment practices including hiring, promotions, job classification, discipline, and terminations. On June 14, 1982, the United States Supreme Court rendered a decision faulting the Fifth Circuit's quasi-automatic across-the-board rule stressing the fact that all the requirements of Rule 23(a), Federal Rules of Civil Procedure must be satisfied for the maintenance of a class action. General Telephone Company of the Southwest v. Falcon, slip op. No. 81-574 (U.S. June 14, 1982). Relying on Falcon, defendants filed a motion to vacate the order

certifying class (Document 143) to which plaintffs responded in Document 146. Plaintiffs have filed a motion to intervene (Document 141) requesting this court to enter an order permitting Alvin Smith to intervene as a named plaintiff to represent the class of applicants who defendants have denied employment on the basis of a facially objective selection procedure which allegedly has a disparate impact upon black applicants. Defendants responded to this motion in Document 145.

Peners L. Griffin is a black employee of the Florida Department of Corrections. Plaintiff Griffin unsuccessfully applied for several promotions within the Department. Document 58, Defendants' Admissions 21-25, 30-32. He also alleges that he had been terminated twice for discriminatory reasons but

eventually was reinstated. Document 54, Second Amended Complaint ¶ 14. Griffin filed a charge of discrimination with the Equal Employment Opportunity Commission on February 22, 1975, and received a Notice of Right-to-Sue letter. Document 58, Defendants' Admission 20.

Henry L. Dejerinett, a black, unsuccessfully applied for the position of Property Manager III within the Department. Document 58, Defendants' Admissions 33 & 34. Defendant Dejerinett alleges that he was not hired because of defendants' impermissible racial considerations. Document 54, Second Amended Complaint ¶15. He filed a charge of discrimination with the Equal Employment Opportunity Commission. Document 57, Attachment.

Defendants assert that plaintiffs Griffin and Dejerinett cannot adequately

represent the class as preliminarily certified. Defendants posture that, at best, Griffin can adequately represent employees seeking promotion within the correctional officer lines within any region he applied for promotion and Dejerinett can adequately represent applicants seeking employment for clerical/office positions within region I. Defendants further claim that neither Griffin nor Dejerinett can represent a sub-class of applicants rejected for employment because they failed to receive a passing score on the FDOA exam given to all applicants for correctional officer jobs. Finally, defendants urge this court to inquire into plaintiffs' ability to bear the costs of this suit.

The Falcon decision mandates that this court carefully examine the requirements of Rule 23(a), Federal Rules of

Civil Procedure. No. 81-574, slip op. at 9. The first requirement is that "the class is no numerous that joinder of all members is impracticable." Federal R.Civ.P. 23(a)(1). The number of black persons employed by the Department in February 1981 was 1,346. Document 82, Defendants' Admission 62. This number alone, without inquiry as to the number of past and potential black employees, clearly indicates that the class members are too numerous to join.

The second requirement is that "there are questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). Plaintiffs have alleged a common practice and pattern of racial discrimination which affects defendants' hiring promotion, job classification, disciplinary, and termination decisions. This general discriminatory policy

commonly injures all members of the class of past, present, and potential black employees of the Department. Plaintiffs maintain that they will utilize similar statistical data, similar historical background and the same or similar witnesses to support their allegations of class-wide discrimination. This court is satisfied that the commonality requirement of Rule 23 is met.

The third prerequisite for maintaining a class action is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed.R.Civ.P. 23(a)(3). This court must inquire "whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." Falcon, slip op. at 10 n.3. Plaintiff

Griffin certainly can adequately protect the interests of black employees who have claims of discrimination in promotions, job classifications, discipline, and terminations. Plaintiff Dejerinett's claim is somewhat interrelated with the class claims of a discriminatory hiring policy. Plaintiffs allege that blacks are not hired in sufficient number because of facially neutral objective criteria, i.e., a high school education requirement and the FDOA test, which have a disparate impact on black applicants and of a subjective barrier which causes the almost exclusively white decision-makers to discriminate against black applicants. The class claim against discriminatory subjective hiring decisions is fairly encompassed in Dejerinett's claim. This court, however, is concerned that the class claim against

the Department's objective screening criteria which have a disparate impact upon class members, especially the FDOA test, is not fairly and adequately protected by any of the named plaintiffs.

The fourth requirement is that "the representative parties will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This court notes that plaintiffs and plaintiffs' counsel have efficiently litigated this complex action for three years, and trial will commence in three weeks. This demonstrates that plaintiffs are adequate representatives of the class. The court, however must also inquire whether there is a conflict of interest between the named plaintiffs and the class they seek to represent. See Falcon, slip op. at 10 n. 13. This court is mindful of the possible conflict of interest for

Plaintiff Griffin to represent applicants who were denied employment and who, if granted relief, might compete with him for promotions. The United States Supreme Court held that "[u]nder Rule 23, the same plaintiff could not represent these classes [of applicants]." General Telephone Company of the Northwest v. Equal Employment Opportunity Commission, 446 U.S. 318, 331 (1980). This court is of the view that if an unsuccessful applicants for a correctional officer position becomes a class representative, that applicant can adequately represent potential black employees. The prejudice which may result from the conflict between Griffin and the class of potential employees is far outweighed by the prejudice which would result if applicants could not be members of the class certified in this action. As is

discussed more fully below, this suit has been litigated for years as a class which included applicants. See, e.g., Documents 54, 108, and 120. Extensive discovery has taken place on the hiring issue. See, e.g., Documents 37, 38, and 43. It would be greatly prejudicial, at this late date, to exclude potential employees from the class.

This suit is a class action for injunctive or declaratory relief under Rule 23(b)(2;, Federal Rules of Civil Procedure. Defendants' contention that the class cannot encompass all the regions in the state because employment decisions are made independently at each regional level is not well-taken. Plaintiff Griffin has applied for promotion in four out of the five regions in the state. The propriety of defendants' behavior will be determined in a

single action, and if plaintiffs prevail, this court can fashion an adequate remedy.

Plaintiffs strenuously maintain the position that Griffin can adequately represent the class; however, in the alternative, plaintiffs have filed a motion to intervene on behalf of Alvin Smith. Mr. Smith applied for employment as a Correctional Officer I. Initially, Mr. Smith was denied employment because he had not completed high school. After obtaining his GED, he was again denied employment because he failed the written examination required of Correctional Officer I applicants.

Plaintiffs did not specify in their motion whether this was intervention of right, Fed.R.Civ.P. 24(a), or permissive intervention, Fed.R.Civ.P. 23(b). The foregoing discussion clearly demonstrates

that plaintiff may intervene as a matter of right.

Alvin Smith, an unsuccessful applicant, certainly has an interest in this suit which seeks to challenge defendants' employment practices, including hiring. Unless he is permitted to intervene, his interest may not be adequately represented by the named parties. Mr. Smith eases this court's concern that the class claim against the Department's objective criteria was fairly and adequately protected by the named plaintiffs. Alvin Smith is a proper representative for potential black employees.

This court is of the view that this motion was timely filed. Falcon, which altered this circuit's position on across-the-board discrimination claims, was decided on June 14, 1982. Plaintiffs

filed their motion to intervene on July 8, 1982, as a result of Falcon. This court finds that defendants will not suffer prejudice if Smith is allowed to intervene. Defendants have been on notice since the institution of this action that they must defend against hiring claims. The parties have conducted discovery regarding the hiring issue, and have vigorously litigated this claim as evidenced by the motion for partial summary judgment (Document 108).

Defendants further contend that Smith cannot be a class representative because he did not timely file an EEOC complaint. This circuit adopted the single filing rule whereby "once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similar-

ly situated...." Oatis v. Crown Zellerbach Corp., 398 F.2d 496, 498 (5th Cir. 19680. An examination of Griffin's charges of discrimination (Document 148 Exhibits A & C) reveals that Griffin raised the hiring claim in addition to promotion, job classification, discipline, and termination claims. Griffin's charge, therefore, exhausted administrative remedies for the whole class and for all the claims.

ACCORDINGLY, it is ORDERED:

1. Defendants' motion to vacate order certifying class is DENIED.

2. Plaintiffs' motion to intervene is GRANTED.

3. This action shall continue to be certified as a class with PENERS L. GRIFFIN, HENRY L. DEJERINETT, and ALVIN SMITH as named plaintiffs representing a class of all past, present, and potential

black employees of the State of Florida Department of Corrections.

DONE AND ORDERED this 28th day of July, 1982.

s/s William Stafford
WILLIAM STAFFORD
Chief Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

No. TCA 79-1016

Decided: August 25, 1983

PENERS L. GRIFFIN and HENRY L. DEJERINETT,

Plaintiffs,

and

ALVIN SMITH,

Intervenor,

all individually and on behalf of all others similarly situated,

v.

LOUIE L. WAINWRIGHT, individually and in his official capacity as Secretary of the Department of Corrections of Florida; THE STATE OF FLORIDA; THE DEPARTMENT OF CORRECTIONS, and any predecessor or successor agency; and RAYMOND W. GEARY, individually and in his official capacity as attorney for the Department of Corrections of Florida,

Defendants.

MEMORANDUM OPINION

This is a civil rights class action brought pursuant to 42 U.S.C. §§ 1981, 1983 and 2000e alleging discriminatory employment practices based on race. Federal jurisdiction is found in 28 U.S.C. § 1343. This action also involves individual claims of the named plaintiff Peners L. Griffin which are stated in Counts II and III of the second amended complaint. The issue of liability for the class claims was tried before the court without a jury from August 17, 1982, to September 17, 1982, following which the parties submitted extensive post-trial memoranda. From the pre-trial stipulation, the exhibits, admissions of the parties, and all testimony, and after considering the legal arguments made before, during, and after trial, the court now makes its findings of fact and

conclusions of law as required by Rule 52, Federal Rules of Civil Procedure.

FINDINGS OF FACT

I. HISTORY OF THE CASE

Plaintiff Peners L. Griffin, a black male, became employed with defendant Florida Department of Corrections (FDOC) or its predecessor agency in April 1971. Plaintiff Griffin was the first black person hired as a Road Prison Officer at the Tallahassee Road Prison operated by defendant FDOC. Since January 1973, plaintiff Griffin has applied for several promotions, but has never been selected Griffin received at least satisfactory employee evaluations from his date of hiring until sometime in 1974 when Wayne Scott, a white male, became Chief Correctional Counselor in Tallahassee. Scott fired Griffin in 1974; however, Regional Superintendent Hicks, a white

male, reinstated Griffin because FDOC failed to follow proper termination procedures. In early 1975 Griffin again was terminated, and he filed a Career Service appeal. The Career Service Commission found no "good cause" for Griffin's dismissal and ordered his reinstatement with back pay. On or about February 22, 1975, Griffin also filed a charge of discrimination with the Equal Employment Opportunity Commission (the EEOC) in which he alleged discrimination by the FDOC against blacks in discipline, hiring, promotions, and other employment practices. Defendants contend and plaintiffs deny that Griffin withdrew his 1975 charge; however, this issue was never raised at trial. Griffin requested a right-to-sue letter and received it on about July 23, 1979. Griffin filed this suit as a class action on October 15,

1979.

Griffin has been disciplined several times, and he has filed at least one other charge of discrimination with the EEOC against the FDOC. He requested and received a right-to-sue letter on this later charge on or about April 10, 1980.

Henry L. Dejerinett, a black male, applied for the FDOC position of Property Manager III in November 1978 Plaintiff Dejerinett was not hired; Kenneth Hayes, a white male, was selected. Dejerinett filed a charge of discrimination against the FDOC and received a right-to-sue letter on or about April 2, 1980.

On June 17, 1980, plaintiff Griffin sought leave of court to amend his complaint to add Henry L. Dejerinett as a named plaintiff. This court granted the motion by order dated November 25, 1980 (Document 53). Plaintiffs filed a second

amended complaint (Document 54) on December 15, 1980.

Based on the parties' stipulation, this court, by order dated March 10, 1981 (Document 84), certified the action as a class action with Peners L. Griffin and Henry L. Dejerinett representing a class of all past, present, and potential black employees of the FDOC. On July 8, 1982, defendants filed a motion to vacate the order certifying the class and plaintiffs moved for an order permitting Alvin Smith to intervene.

Alvin Smith, a black male, was denied employment as a Correctional Officer I because he had not earned a high school diploma or a general education degree (GED). Smith obtained a GED but failed the written correctional officer examination in July 1981. He, therefore, was denied employment.

This court allowed Smith to intervene to represent potential black employees. The court also reviewed the class certification in light of the recent case of General Telephone Company of the Southwest v. Falcon, 72 L.Ed.2d 740 (1982). By order dated July 28, 1982 (Document 150), the court continued to certify this action as a class action with Peners L. Griffin, Henry L. Dejerinett, and Alvin Smith as named plaintiffs and intervenor representing a class of all past, present, and potential black employees of the FDOC.

On July 30, 1982, this court entered an order (Document 157) granting partial summary judgment for plaintiffs and finding that the correctional officer written examination utilized by defendants in screening applicants for correctional officer positions had a

disparate impact upon class members which had not been justified by business necessity. This court denied summary judgment on the hiring and promotion claims because the court found plaintiffs' statistics used to support their claims were flawed.

Phase I, the liability for class claims, commenced on September 17, 1982. Phase I, part 1, consisted mostly of witnesses who were experts in the fields of economics and statistics. Phase I, part 2, was anecdotal evidence.

II. CLASS REEVALUATION

The court has a continuing duty to reevaluate class status throughout the litigation. Vuyanich v. Republic National Bank of Dallas, 505 F.Supp. 224, 233 (N.D. Tex. 1980); see also Cooper v. University of Texas at Dallas, 482 F. Supp. 187, 190 (N.D. Tex. 1979), aff'd,

648 F.2d 1039 (5th Cir. 1981). Although defendants have not filed a post-trial motion to decertify the class, they argue that plaintiff Griffin voluntarily withdrew his 1975 charge of discrimination and that there is no proof that the charge was an "across-the-board" claim. Defendants first raised the issue of whether Griffin withdrew the 1975 charge in a motion to dismiss the first amended complaint (Document 17). This court held that "the factual dispute regarding plaintiff's waiver of rights conferred by Title VII is an issue for trial " Document 53.

This issue was next mentioned in the pre-trial stipulation under the heading "Admitted Facts Requiring No Proof." It states:

> The Plaintiff, Peners L. Griffin, filed a charge of Discrimination, pursuant to Title VII, on or about February

> 22, 1975. A true copy of that charge has been filed in this action as Exhibit "A" To a Stipulation (Document 148) and is properly in evidence A Notice of Right-to-Sue was duly issued by the Department of Justice regarding that charge, and this action was timely filed under Title VII. Defendants assert and Plaintiffs deny that Griffin withdrew the charge

Document 166, p.11.

This issue was not litigated at trial and, in fact, was not raised until defendants' response and objections to plaintiffs' proposed findings and conclusions (Document 215).

This court is of the view that plaintiffs have both pleaded and proved that Griffin filed a charge of discrimination on or about February 22, 1975, and that he received a right-to-sue letter. As the pre-trial stipulation notes, the charge and letter are properly in evidence. Defendants have failed to

prove the defense that Griffin voluntarily withdrew the 1975 charge. The class, therefore, may rely on Griffin's 1975 charge, because the Fifth Circuit adopted the single filing rule whereby "once an aggrieved person raises a particular issue with the EEOC which he has standing to raise, he may bring an action for himself and the class of persons similarly situated. . . ." Oatis v. Crown Zellerback Corp., 398 F.2d 496, 498 (5th Cir. 1968).

Defendants have also argued that there is only "the naked assertions of Griffin and his attorneys ... that the destroyed charge was an 'across-the--board' claim." Document 215, p.2. This statement is inaccurate. The 1975 charge is in evidence (Document 148, Exhibit A). A review of that charge clearly indicates that Griffin set forth

an across-the-board claim challenging the FDOC's practices in hiring, discipline, and promotions of blacks.

Griffin has alleged that these discriminatory practices are the result of a subjective decision-making process which has its roots in pre-Act procedures and continues until the present. Because plaintiffs attempted to prove that this discrimination pervades a pattern of events and is not isolated incidents, the charge could have been filed at any time. See Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 472-73 (D.C. Cir. 1976); Wetzel v. Liberty Mutual Insurance Company, 508 F.2d 239, 246 (3rd Cir. 1975); Cooper v. University of Texas at Dallas, 482 F. Supp. 187, 190 (N.D. Tex. 1979). Defendants' liability commences March 24, 1972, the date which Title VII became applicable to the FDOC. The only

employees barred from the class are those who left the employ of the FDOC more than 300 days before the filing of Griffin's 1975 charge. See Laffey, 567 F.2d at 472-74; Wetzel, 508 F.2d at 246; Cooper, 482 F. Supp. at 190.

Defendants failed to present any evidence at trial which altered this court's findings that plaintiffs met the requirements for class certification set forth in Rule 23, Federal Rules of Civil Procedure (Document 150). This court now reaffirms its decision that this action shall be certified as a class action with Peners L. Griffin, Henry L. Dejerinett, and Alvin Smith as named plaintiffs and intervenor representing a class of all past, present, and potential black employees of the FDOC.

III. THE DEFENDANTS

Plaintiffs have sued Louie L. Wainwright, individually and in his official capacity as Secretary of the Department of Corrections of Florida. Defendant Wainwright is the chief executive officer of the FDOC.

Plaintiffs have also sued the State of Florida and the Department of Corrections. This court orally ruled that when referring to the State of Florida in this case, it shall mean the Florida Department of Corrections. Defendant FDOC is an executive department of the State of Florida and is an employee within the meaning of Title VII. 42 U.S.C. § 2000e(b).

Plaintiffs sued Raymond W. Geary, individually and in his official capacity as attorney for the FDOC. Defendant Geary was employed as general counsel for

the FDOC during pertinent times encompassed in this litigation.

IV. THE FLORIDA DEPARTMENT OF CORRECTIONS

The Department of Corrections has "supervisory and protective care, custody, and control of the inmates, buildings, grounds, property, and all other matters" pertaining to the state correctional system. Fla. Stat. § 945.025 (1981). In 1981, over half of the FDOC work force, 4451 out of 8594 jobs, was in EEO Category No. 4, Protective Services. The following positions with the FDOC are protective service jobs:

Correctional Counselor Chief I
Correctional Counselor Chief II
Correctional Officer Chief I
Correctional Officer Chief II
Correctional Officer Chief III
Correctional Officer I
Correctional Officer II
Correctional Officer III
Correctional Security Coordinator
Correctional Security Shift

Supervisor I
Correctional Security Shift
Supervisor II
Fire Chief
Firefighter II
Prison Inspector and Investigation Supervisor
Prison Inspector and Investigator

There are statutory qualifications for the correctional Officer position. The Florida Statutes required:

> After July 1, 1974, any person employed as a correctional officer shall:
> (1) Have reached the age of majority.
> (2) Be a citizen of the United States.
> (3) Be a high school graduate or its equivalent" as the term may be determined by the council.
> (4) Have his fingerprints on file with the council or agency designated by the council.
> (5) Have passed an examination by a licensed physician based on specifications established by the council.
> (6) Have a good moral character as determined by investigation under procedures established by the council.

Fla. Stat. $ 944.584 (1975). These requirements have changed slightly. Since July 1, 1980, one must be age nineteen and after July 1, 1981, meet the additional requirement of not having been convicted of a felony or misdemeanor involving moral turpitude. Fla. Stat. § 943.13 (1981).

An applicant seeking a position as a correctional officer was required to pass a written examination consisting of seventy-five questions to be considered for employment. Any applicant who failed to score at least thirty-eight on the test was automatically excluded from consideration. The FDOC ceased using a written examination in August, 1982, immediately after this court found that it had a disparate impact.

V. THE DECISION-MAKING PROCESS

A. Hiring

When there is a vacancy for a correctional officer, the FDOC issues a vacancy announcement. Applicants file applications which are reviewed by the personnel officer at the institution where there is a vacancy. The applications are screened for the minimal requirements such as age and education. Then the applications are reviewed by a committee which usually consists of a chief correctional officer, a lieutenant, and sometimes a personnel manager at the location. The committee interviews applicants who are deemed to be qualified and prior to August, 1982, those who had passed the written examination. The interview normally consists of questions about an applicant's prior work history, interest in the field, and

questions designed to determine an applicant's potential effectiveness as a correctional officer. The committee makes a recommendation to the institution's superintendent who has the hiring authority.

The hiring process for clerical employees is similar to the procedure used for correctional officers. Usually a clerical vacancy is advertised locally and the personnel office screens the applications. The supervisor or department head further screens the applications and after interviewing the applicants, makes a recommendation through the personnel manager to the superintendent who is the hiring authority.

B. Promotions

When there is a vacancy for a position above a Correctional Officer I position, a vacancy announcement is

published. The applications are reviewed by the personnel office, which forwards applications of those who meet the training and experience requirements set forth in the class specifications to the chief correctional officer. A committee interviews the qualified applicants and makes a recommendation through the personnel officer to the superintendent Generally the criteria considered in promotional decisions are:

(1) seniority;
(2) training;
(3) education;
(4) time on the job (actual experience gained in the position sought, such as in an "acting" capacity);
(5) job stability;
(6) professional development;
(7) performance evaluation;
(8) recommendations from peers and superiors;
(9) demonstrated leadership; and
(10) administrative experience.

C. Performance Evaluations

An employee's supervisor completes an employee service rating or evaluation.

The employee is rated unsatisfactory, conditional, satisfactory, above satisfactory, or outstanding in the following areas:

(1) appearance;
(2) attendance;
(3) cooperation;
(4) dependability;
(5) health;
(6) initiative;
(7) knowledge of job;
(8) quality of work;
(9) quantity of work; and
10) safety.

The evaluation is routed through the next higher level supervisor and then to the institution's personnel manager for final review and filing.

VI. STATISTICAL EVIDENCE

A. Theoretical Approaches

The two theories which may be applied to a particular set of facts to show discrimination are disparate impact and disparate treatment. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

Liability for claims of disparate impact arise when a facially neutral employment practice imposes a harsher result on one group than another and cannot be justified by business necessity. A disparate impact plaintiff need not show intentional discrimination. Griggs v. Duke Power Company, 401 U.S. 424 (1971).

Disparate treatment is a type of discrimination where the employer treats some people less favorably than others because of their race, color, religion, sex, or national origin. The standards for evaluating classwide disparate treatment claims are found in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), and Hazlewood School District v. United States, 433 U.S. 299 (1977). The plaintiff has the burden of proving a prima facie case that defendant inten-

tionally discriminated against a protected class as its regular practice. Plaintiff may prove the prima facie case solely by statistics. Discriminatory intent or motive may be inferred by the statistics alone if the statistical disparity is great. Payne v. Travenol Laboratories Inc., 673 F.2d 798, 817 (5th Cir. 1982) (citing Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 265-66 (1971)). A plaintiff, however, may enhance his case by presenting evidence of the employer's history of discrimination or anecdotal testimony as to individual cases of discrimination. Payne, 673 F.2d at 817.

Once plaintiff has proved his prima facie case, defendant must rebut this showing by demonstrating that plaintiff's proof is either inaccurate or insig-

nificant. Teamsters, 431 U.S. at 360. If the employer fails to rebut plaintiff's case, there is a violation of Title VII. Teamsters, 431 U.S. at 361. The Teamsters' pattern of proof is appropriate for the §§ 1981 and 1983 claims as well as the Title VII claims. Payne, 673 F.2d at 818.

B. Plaintiffs' Statistical Case

Plaintiffs have primarily relied on statistics to prove their claims of discrimination. Dr. David W. Rasmussen, Professor of Economics at Florida State University, Tallahassee, Florida, testified for plaintiffs at trial. Dr. Rasmussen defined his task as determining in an analytical way if the FDOC has been drawing from the labor pool in a racially random way. Dr. Rasmussen used the 1970 census and the Department of Administration's register summaries to construct a

series of availability labor pools. He then tested his proxy availability pool of blacks against incumbents for statistical significance using the approximation to the binomial distribution test approved by the United States Supreme Court in Casteneda v. Partida, 430 U.S. 482 (1977). Plaintiffs' Exhibit No. D-1 amended. Dr. Rasmussen's benchmarks for his state workforce analyses ranged by .23 (Plaintiffs' Exhibit No. D-1 amended, Table 9) to .38 (Id., Table 2). This court will examine Tables 9 and 2 in detail.

TABLE 9

CORRECTIONAL OFFICER I
STATE WORKFORCE ANALYSIS

Year	Actual[38] Total	Black	Geographic Adjusted Bench-mark[39]
1972	1066	55	.23

---

[38] Incumbents from DOC documents entitled:

6/30/72 Division of Corrections, incumbents by job class (Plaintiffs' Exhibit A-3).

FY 74-75 DOR Job Classification Chart (Plaintiffs' Exhibit A-4).

6/30/77 DOR Job Classification Chart (Plaintiffs' Exhibit A-5).

1978-1981 Minority and Female Staffing Report (Plaintiffs' Exhibits A-6, 7, 8, 9), New hires from Plaintiffs' Exhibit A-11.

[39] Includes Service workers exclusive of private household, Farmers, all Laborers and all Operatives, earning less than $6000 in 1969, and having completed 12 to 15 years of education. Sources: 1970 Census of the Population, Table 175 and 176.

This benchmark includes occupational groups throughout the State, exclusive of Bay, Duval, Escambia, Franklin, Gulf, Hamilton, Holmes, Jefferson, Madison, Nassau, Okaloosa, Santa Rosa, Taylor, Walton, Washington, St. Jonns, Leon and Wakulla counties.

FY 1974-75	1648	202	.23
1977	2518	336	.23
1978	3119	461	.23
1979	3232	523	.23
1980	3488	618	.23
1981	3415	631	.23
NEW HIRES FY 77-78	1570	237	.23

Year	Expected Numberr of Black	Number of Std. Dev.
1972	245.18	13.84
FY 1974-75	379.04	10.36
1977	579.14	11.51
1978	717.37	10.91
1979	743.36	9.21
1980	802.24	7.41
1981	785.45	6.28
NEW HIRES FY 77-78	361.10	7.44

In Table 9 Dr. Rasmussen reached a .23 benchmark which reflects four factors: geography, occupation, income, and education. This proxy labor pool excludes people living in eighteen counties which are not adjacent to counties with major prisons. Dr. Rasmussen assumed that people would not commute from these eighteen counties to work at a prison as a correctional officer. The 23 benchmark includes only people from the 1970 census who listed their occupations as farmers, laborers, operatives, or service workers exclusive of private household. Dr. Rasmussen hypothesized that correctional officer applicants would most likely come from those occupational groups. The benchmark was also adjusted for income to include those groups whose median income was less than $6000. in 1969. In 1970 the

starting salary for a correctional officer was approximately $5600. Dr. Rasmussen assumed that persons in occupational groups earning more than an annual salary of $6000 would be unwilling to apply for a position as correctional officer and receive a lower salary. The last adjustment to the benchmark was for education Dr. Rasmussen included only those persons with twelve to fifteen years education because a high school diploma or a general education degree is a statutory requirement for correctional officers.

After considering these four factors, Dr. Rasmussen calculated the appropriate benchmark at .23 which means that black? comprised 23% of his proxy labor pool. Dr. Rasmussen theorized that if the FDOC drew from the labor pool in a racially random way, then 23% of its new

hires should be black.

Table 9 was the incumbent workforce because data on new hires is limited. When Dr. Rasmussen tested his proxy availability pool of blacks against incumbents, he found statistically significant underrepresentation of blacks in defendants' workforce.

TABLE 2

CORRECTIONAL OFFICER I
STATE WORKFORCE ANALYSIS

Year Only[41]	Actual[40] Total	Actual[40] Black	Income Adjusted Benchmark Males
1972	1066	55	.38
FY 1974-75	1648	202	.38
1977	2518	336	.38
1978	3119	461	.38
1979	3232	523	.38

---

[40] Incumbents from DOC documents entitled:

6/30/72 Division of Corrections, incumbents by job class (Plaintiffs' Exhibit A-3).

FY 74-75 DOR Job Classification Chart (Plaintiffs' Exhibit A-4).

6/30/77 DOR Job Classification Chart (Plaintiffs' Exhibit A-5).

1978-1981 Minority and Female Staffing Report (Plaintiffs' Exhibits A-6, 7, 8, 9).

[41] Includes Service workers exclusive of private household, all laborers, all operatives and farmers, earning less than $6000 in 1969. Sources: 1970 Census of the Population, Table 175.

1980	3488	618	.38
1981	3415	631	.38

Year	Expected Number of Black	Number of Std. Dev.
1972	405.08	22.09
FY 1974-75	626.24	21.53
1977	956.84	25.48
1978	1185.22	26.72
1979	1228.16	25.55
1980	1325.44	24.68
1981	1297.70	23.50

In Table 2, Dr. Rasmussen reached a .38 benchmark which reflects three factors: occupation, income, and gender. Dr. Rasmussen made the same assumptions concerning occupation and income as he did for Table 9. He also counted only males in this benchmark because he assumed most correctional officers were men. Considering these factors, Dr. Rasmussen's proxy population consisted of 38% blacks. When Dr. Rasmussen tested his availability pool of blacks against incumbents, he found an even greater underrepresentation of blacks as correctional officers in the FDOC's workforce.

Dr. Rasmussen also constructed a benchmark using data from defendants' register summaries. The Department of Administration maintains a register of persons who have completed applications for state employment and have stated a

class of positions or classes of positions of employment for which they are eligible and have an interest in applying. The register covers a four-year period beginning approximately October 8, 1977, and ending approximately October 8, 1981.

The Department of Administration processes all applications of applicants who are required to pass an examination. During the period covered by this report, the Department of Administration administered the Correctional Officer I examination only to those persons who were interested in becoming eligible for Correctional Officer I positions and met the age and education requirements. Data concerning applicants who fail the examination are purged from the register at the end of six months.

Data concerning applicants are deleted from the register upon specific request of the applicant, upon the expiration of a four-year period, or upon the expiration of a six-month period for applicants who failed the written examination. Information concerning an applicant remains on the register even though the applicant may have been hired, promoted, or otherwise become unavailable for employment in a class of positions.

This register is the data base for the statewide register summary. Plaintiffs' Exhibit No. A-1. The data contained in the statewide register summary is a report of the race and gender characteristics of all applicants who provided race and gender information. Only half of the applicants, however, provided this information.

The race and gender identifications of those persons are reported by class code number for each class of positions for which such persons requested that their eligibility be determined. Those persons who have applied for more than one class and for whom race and gender are available are reported in each class for which they have applied. Within each class, such persons are reported only once.

The register is also the data base for the county register summary. Plaintiffs' Exhibit No. A-2. This report contains race and gender information but also indicated one or more counties where the applicant was willing to work. Only 30% of the applicants provided this information. Those applicants who expressed a willingness to work in more than one county are reported in this

report in each such county in each class of positions for which they have applied; therefore, there would be multiple counting of those applicants.

TABLE 10

CORRECTIONAL OFFICER I
STATE WORKFORCE ANALYSIS

Year	Actual[42] Total	Actual[42] Black	Register State Benchmark[43]
1972	1066	55	.31
FY 1974-75	1648	202	.31
1977	2518	336	.31
1978	3119	461	.31
1979	3232	523	.31
1980	3488	618	.31
1981	3415	631	.31

---

[42] Incumbents from DOC documents entitled:

6/30/72 Division of Corrections, incumbents by job class (Plaintiffs' Exhibit A-3).

FY 74-75 DOR Job Classification Chart (Plaintiffs' Exhibit A-4).

6/30/77 DOR Job Classification Chart (Plaintiffs' Exhibit A-5).

1978-1981 Minority and Female Staffing Report (Plaintiffs' Exhibits A-6, 7, 8, 9).

[43] The benchmark is derived from Plaintiffs' Exhibit A-2, and is the proportion of black eligibles among all eligibles.

Year	Expected Numberr of Black	Number of Std. Dev.
1972	330.46	18.24
FY 1974-75	510.88	16.45
1977	780.58	19.16
1978	966.89	19.59
1979	1001.92	18.21
1980	1081.28	16.96
1981	1058.65	15.82

Dr. Rasmussen's register state benchmark was 31. Plaintiffs' Exhibit No. 2 shows that 31% of the applicants who sought eligibility for a Correctional Officer I position and who provided race and gender information and specified a county were black.

In Table 10 of Plaintiffs' Exhibit No. D-1 amended, Dr. Rasmussen tested his proxy applicant pool of 31% blacks against incumbent data. He found statistically significant underrepresentation of blacks in the Correctional Officer I position in defendants' workforce.

Approximately 10% of defendants' workforce is comprised of clerical workers. Dr. Rasmussen prepared tables on the clerical position using both the 1970 census and the register summaries.

TABLE 1

ANALYSIS OF PRIMARY CLERICAL CLASSES USING REGISTER BENCHMARK[44]

JOB TITLE	TOTAL[45]	BLACK[46]
1978		
Clerk Typist II	204	34
Secretary II	213	18
1979		
Clerk Typist II	168	33
Secretary II	208	18
1980		
Clerk Typist II	295	79
Secretary 11	217	25
1981		
Clerk Typist II	316	92
Secrerary II	215	23

---

[44] Clerk typist II and secretaries II comprise between 38%-56% of the clerical workforce during all periods between 1972-1981, and 41% to 56% between 1978-1981.

[45] Number of total and black incumbents is taken from DOC Minority and Female Staffing Reports 1978-1981. (Plaintiffs' Exhibits A-6, 7, 8, 9).

[46] Number of total and black incumbents is taken from DOC Minority and Female staffing reports 1978-1981. (Plaintiffs' Exhibits A-6, 7, 8, 9).

JOB TIBLE	REGISTER BENCHMARK[47]	EXP BLK	NO.OF DEVS.
	1978		
Clerk Typist II	.32	65.28	4.69
Secretary II	.29	61.77	6.61
	1979		
Clerk Typist II	.32	53.76	3.43
Secretary II	.29	60.32	6.47
	1980		
Clerk Typist II	.32	94.40	1.92
Secretary 11	.29	62.93	5.67
	1981		
Clerk Typist II	.32	101.12	1.10
Secrerary II	.29	62.35	5.91

---

47 Number of total and black incumbents is taken from DOC Minority and Female Staffing Reports 1978-1981. (Plaintiffs' Exhibits A-6, 7, 8, 9).

Using the statewide register summary, Dr. Rasmussen calculated the benchmark for the Clerk Typist II and Secretary II positions as .32 and .29 respectively. He compared this with incumbent data and found gross statistical disparities except for the Clerk Typist II position beginning in 1980. See Plaintiffs' Exhibit No. D-2, Table 1.

Dr. Alan A. Parrow, Director of Research at Hoffmann Research Associates, Inc. in Chapel Hill, North Carolina, also testified at trial as an expert for plaintiffs. Dr. Parrow analyzed gross hiring data which were set forth in the pre-trial stipulation (Document 166 %% F(10)-(12)).

	Total	White	Black
FY 1974-75			
Applications	3967	3092	861
Hires	1579	1300	268
FY 1976-77			
Applications	10,643	8389	1972
Hires	3212	2660	445

FY 1977-78			
Applications	9517	7312	1963
Hires	2405	1957	371

These data represent hiring for all positions with the FDOC and all applicants whether eligible or ineligible. Using the chi-square method, Dr. Parrow found that blacks were hired less frequently than whites and the results were statistically significant. See Plaintiffs' Exhibit No. D-10.

Dr. Parrow also testified about discrimination in promotions. Plaintiffs' Exhibit No. D-6 summarizes the correctional officer line of progression for each year when data were available. Plaintiffs' Exhibit D-6 demonstrates that blacks decrease in representation as one moves from lower level positions to higher level positions. Dr. Parrow used the Wilcox on two-sample test to determine whether the result was statistical-

ly significant. In each case Dr. Parrow found statistical significance exceeding two standard deviations.

FY	Total
Involuntary Terminations*	57
Voluntary Terminations*	480
Dismissals	89
Suspensions	25
Written Reprimands	104
Oral Reprimands	181

FY	Total
Involuntary Terminations*	198
Voluntary Terminations*	1889
Dismissals*	199
Suspensions	52
Demotions	21
Written Reprimands	246
Oral Reprimands	462

FY	Total
Involuntary Terminations*	115
Voluntary Terminations*	1626
Dismissals*	165
Suspensions*	101
Demotions	37
Written Reprimands*[48]	230
Oral Reprimands*[49]	333

---

[48]* The Black and White columns do not add up to the total.

Information for Dade Correctional Institution is unknown and not included.

[49] Information for Dade, Desota, and Avon Park correctional Institutions is unknown and is not included.

FY	White	Black
Involuntary Terminations*	44	12
Voluntary Terminations*	415	64
Dismissals	52	37
Suspensions	16	9
Written Reprimands	81	23
Oral Reprimands	141	40

FY	White	Black
Total		
Involuntary Terminations*	138	58
Voluntary Terminations*	1609	239
Dismissals*	140	57
Suspensions	36	16
Demotions	21	0
Written Reprimands	177	69
Oral Reprimands	385	77

FY	Total	Black
Involuntary Terminations*	74	37
Voluntary Terminations*	1345	245[2]
Dismissals*	109	51
Suspensions*	74	26
Demotions	34	3
Written Reprimands*[50]	180	49
Oral Reprimands*[51]	261	69

---

[50]* The Black and White columns do not add up to the total.

Information for Dade Corectional Institution is unknown and not included.

[51] Information for Dade, Desota, and Avon Park Correctional Institutions is unknown and is not included.

Dr. Parrow also analyzed the FDOC's imposition of discipline from the data contained in the pre-trial stipulation (Document 166 ¶¶ F(10)-(12)).

Dr. Parrow used the chi-square statistical tool to analyze the data. Plaintiffs' Exhibit No. D-9. He found that the level of statistical significance exceeded two to three standard deviations. Dr. Parrow testified that blacks received proportionately harsher discipline than whites and that the probability of chance occurrence of these results was less than one in ten thousand.

C. Defendants' Challenges to Plaintiffs' Statistics

Defendants contend that plaintiffs' benchmarks derived from the 1970 census are seriously flawed. Defendants' labor economics expert, Charles T. Haworth, Professor of Economics at Florida State

University, Tallahassee, Florida, testified at trial that plaintiffs' inclusion in the benchmark of only service workers, laborers, operatives, and farmers excluded many potential applicants. Dr. Haworth found that most correctional officer applications came from clericals. Although Dr. Rasmussen stated that he excluded clericals because mostly females were clericals, Dr. Haworth testified that in 1970, 2470 of the clericals were male. Dr. Haworth also thought it was erroneous to exclude all of the managerial and administrative category. That category is a broad one and would include, for example, a nineteen year old managing a small convenience store. Instead of excluding the entire category, Dr. Haworth would use a money criteria to eliminate those in the managerial and administrative

category earning over a certain annual salary. Dr. Haworth expressed a similar concern with plaintiffs' exclusion of the sales category. He again would include some in the sales category and eliminate highly paid salespersons. Dr. Haworth took issue with the fact that plaintiffs' benchmarks did not consider those leaving the military because several applicants and employees had prior military experience. A major flaw in plaintiffs' benchmarks, Dr. Haworth testified, was that unemployed applicants were not considered. In summary, Dr. Haworth stated that a more appropriate benchmark would include laborers, operatives, farmers, service workers exclusive of private household workers, clericals, part sales, and part managers and administrators with those leaving military service and the unemployed

factored into the benchmark.

Although Dr. Haworth did not compute such a benchmark, he offered evidence to prove that the benchmark would be a lower percentage of blacks than plaintiffs' benchmarks. Defendants' Exhibit No. 7-N, Table 3A. The groups excluded by Dr. Rasmussen that Dr. Haworth would include all have a lower percentage of blacks (2.8 - 5.9%) than the percentage of blacks in the labor force (14.9%) or the proportionate share of blacks represented in plaintiffs' benchmarks (23 - 38%). Additionally, to test the validity of plaintiffs' assumptions concerning the exclusion of some occupational groups, Dr. Haworth reviewed a sample of applications for the period 1979-81. See Defendants' Exhibit No. 7-J. He found that approximately 1/3 of the applicants came from groups that Dr. Rasmussen

excluded from his benchmark.

Dr. Haworth also disagreed with Dr. Rasmussen's removal of all persons in each category in which the median income of the category was more than $6000. Dr. Haworth points out that this procedure may exclude as many as 50% of the persons in that category who are in fact earning less than the median income. Dr. Haworth also sampled applications, Defendants' Exhibit No. 7-E, and testified that persons with incomes above what correctional officers earn did apply for correctional officer positions. On cross-examination, however, Dr. Haworth reviewed the underlying data for the sample, Plaintiffs' Exhibit Nos. I-600-6-03, and found that only two of twenty-six earned higher salaries.

Dr. Haworth also took exception to plaintiffs' exclusion of some occupation-

al categories that are primarily composed of females. Dr. Haworth reasoned that it would be more appropriate to weight the benchmark as to the relative proportion of females to males within these census categories than to totally exclude the groups.

Dr. Haworth testified that, in his opinion, the register summaries should not be used because they are unreliable. His first criticism is that the statewide summary and the county summary only represent 50% and 30% respectively of persons on the register. Dr. Haworth stated that the sample is not random because some people chose not to designate their race. He hypothesized that it would be likely for white persons not to state their race when the employer has an affirmative action plan. Dr. Haworth also stated that the summaries count

incidences of eligibility not people. Furthermore, persons who have failed the written examination and are thereby ineligible nevertheless remain on the register. Defendants conclude that the summaries overrepresent black eligibility.

Dr. Haworth opined that a major flaw in Dr. Rasmussen's tables was that he compared his benchmarks with incumbent data instead of actual hiring data. Defendants admit that actual hiring data are sparse. The record does show, however, that 15.2% of the new hires for correctional officers in fiscal year 1977-78 were black. Plaintiffs' Exhibit No. A-11. Twenty percent of persons hired as correctional officers in 1979 were black. Defendants' Exhibit No. 11-C. Plaintiffs' incumbent data, Plaintiffs' Exhibit No. D-1 amended, show

only 16.2% blacks. In 1980, 24.5% of the correctional officers hired were black. Defendants' Exhibit No. 11-D. Plaintiffs' incumbent data, Plaintiffs' Exhibit No. D-1 amended, show only 17.7% blacks. Defendants' workforce in 1972 was 5% black. This rate has increased to over 18% in 1982.

The incumbent data, therefore, understate the rate that blacks have been hired.

Dr. Haworth testified that Dr. Parrow's calculations with the gross statistics had little value. The analysis of the gross hiring statistics was weak because the raw data did not account for whether the applicants were qualified. The statistics were for the entire FDOC workforce and included a wide variety of occupations including doctors and other professionals where the black

availability rate is low.

Dr. Haworth also discounted the significance of the disciplinary action analysis. Dr. Haworth testified that it is proper to compare what should have happened with what actually happened. The gross statistics did not account for the type of offense or frequency of disciplinary problems with the employee.

Dr. Haworth also testified that Dr. Parrow's analysis on promotions had little value because it failed to consider the fact that fewer blacks than whites are eligible for promotions because of insufficient time on the job or comparable experience.

CONCLUSIONS OF LAW

I. STATISTICAL CASE

Plaintiffs have used both disparate impact and disparate treatment theories for their case with the primary thrust

directed toward the disparate impact of subjective decisionmaking. Defendants argue that except for the challenge to the written examination and high school diploma or equivalent requirement, the claims are disparate treatment claims. Plaintiffs do not assert that the FDOC applied distinct, facially neutral standards to its hiring, promotion, and disciplinary decisions. Plaintiffs, to the contrary, contend that the lack of objective criteria permits defendants to subjectively discriminate against blacks. Generally this subjective discrimination is analyzed under the disparate treatment theory. Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 816-17 (5th Cir. 1982); contra: Rowe v. Cleveland Pneumatic Company, 690 F.2d 88 (6th Cir. 1982). This court finds, however, that plaintiffs' statistical evidence is unper-

suasive under either theory.

This court is of the view that because plaintiffs' statistics are so flawed, plaintiffs have railed to establish a prima facie case. The court agrees with Dr. Haworth's attack on the 1970 census benchmarks. The major flaw is the exclusion of many occupational groups from which defendants showed several correctional officers were previously employed. This factor, in addition to the others mentioned by Dr. Haworth, casts grave doubt upon the credibility and reliability of plaintiffs' census benchmarks.

This court also finds that plaintiffs' register summary benchmarks are similarly unreliable. The register summaries, as Dr. Haworth pointed out, are non-random samples which contain information about both eligible and

ineligible persons.

Finally, the court takes issue with the fact that Dr. Rasmussen's tables compare these suspect benchmarks with incumbent data. This practice produces misleading results, especially when the employer has made rapid strides as the FDOC has in going from 5% to over 18% blacks in the workforce in ten years.

This court is of the view that Dr. Haworth also successfully discredited Dr. Parrow's statistics. The analyses of the gross data for hiring, discipline, and promotions failed to account for many variables, such as: whether the applicant was eligible, the type of behavior being disciplined, or the qualifications of the employee seeking a promotion. The analyses of the raw data are deficient for failing to recognize that several factors op=rate simultaneously to

influence decisions of hiring, discipline, and promotions. Thus, "the findings of statistically significant disparities derived therefrom will not permit an inference of discrimination." Pegues v. Mississippi State Employment Service, 699 F.2d 760, 770 (5th Cir. 1983).

Plaintiffs have argued that defendants had the burden of disproving plaintiffs' statistics with affirmative evidence, such as complete studies of their own. Defendants did attempt to put forth some of their own statistical studies, but the thrust of defendants' attack was to discredit plaintiffs' statistical evidence as unreliable. This court is of the view that defendants sufficiently proved that plaintiffs' statistics had little probative value Plaintiffs, therefore, never established

a prima facie case. See Equal Employment Opportunity Commission v. Datapoint Corporation, 570 F.2d 1264 (5th Cir. 1978); Cooper v. University of Texas at Dallas, 482 F. Supp. 187 (N.D. Tex. 1979), aff'd, 648 F.2d 1039 (5th Cir. 1981); and Dickerson v. United States Steel Corporation, 472 F. Supp. 1304 (E.D. pa. 1978).

II ANECDOTAL TESTIMONY

Plaintiffs sought to bolster their discrimination claims Through anecdotal testimony. Plaintiffs called approximately twenty witnesses who testified to individual acts of discrimination primarily in promotions, discipline, and job assignments. This court is of the view that plaintiffs still have failed to prove a prima facie case.

Some of plaintiffs' witnesses testified that they were denied promo-

tions based on their race. Defendants, however, rebutted most of the testimony by demonstrating the following nondiscriminatory reasons for the failure to promote employee ineligible for position sought (Whitfield Jenkins and Wilmatene Edwards) and employee's disciplinary record (Lester Kinsler and Zondra Harris). Other witnesses testified that they were discriminatively disciplined. Again, defendants advanced nondiscriminatory reasons such as failure to assist (William Turpin), taking money from an inmate (Walter Gray), and breach of security (William McCullough).

Testimony regarding discriminatory job assignments came from primarily eight witnesses representing three institutions (Florida State Prison: Larry Sullivan, William Turpin, and Mark Bevins; Glades Correctional Institution: Gwen Joseph,

Virgilee Graham, and Bobby Ray Hall; Apalachee Correctional Institution: Sam Jones and Kenneth Gibson). Defendants failed to adequately rebut the testimony on job assignment claims. Plaintiffs, however, presented no statistics on this issue and although the testimony was convincing, statements from eight people about three institutions is not sufficient to prove a claim of classwide discrimination against the FDOC.

III INDIVIDUAL CLAIMS OF NAMED PLAINTIFFS

A. Peners L. Griffin

Plaintiff Peners L. Griffin has filed an individual claim against the FDOC alleging discriminatory employment practices. Griffin has complained that he has not received a promotion during his eleven years of employment with the FDOC. In 1973 Griffin applied for a promotion as a Correctional Counselor II

at the Tallahassee Community Correctional Center. He did not receive this promotion; however, evidence was not presented about the person who was promoted. In 1974 plaintiff Griffin again applied for a promotion as a Correctional Counselor II. David Arthur, a white male, was selected. Mr. Arthur was an ex-offender and the FDOC had an affirmative action policy for ex-offenders in 1974.

Plaintiff Griffin has unsuccessfully applied for several other promotions. Richard Roberts, a black male, was a Chief Correctional Counselor at Tallahassee Community Center. He testified that on several occasions he had considered Griffin for promotion opportunities but had not recommended him because of Griffin's general uncooperative attitude and poor employment record.

John Holland, a white Chief Correctional Counselor at Tallahassee Community Correctional Center, has supervisory duties over plaintiff Griffin. Mr. Holland testified that he would not recommend Griffin for promotion because he considers Griffin to be an unreliable, uncooperative, and hostile employee.

Analyzing plaintiff Griffin's promotion claims under a variant form of the standard set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973), this court finds that Griffin cannot prevail. The burden of proof is that plaintiff must show (1) that he belongs to a racial minority; (2) that he applied and was qualified for the promotion he sought; (3) that, despite his qualifications, he was rejected; and (4) that the employer selected an individual from a nonprotected class.

Then the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the employee's rejection. Plaintiff thereafter has an opportunity to show that the employer's stated reason for the employee's rejection was in fact a pretext McDonnell, 411 U.S. at 802-04.

Plaintiff Griffin has shown that he belongs to a racial minority. His second amended complaint lists twelve promotions for which he applied and the court has detected at least one other position in his personnel file (Plaintiffs' Exhibit No. I-50 (Grif)). Although Griffin was not always qualified for the position (e.g. Inmate Classification Specialist in September 1974), he has proved that he was qualified for some of the positions [Correctional Counselor II). This court has no knowledge whether Griffin was

qualified for the other positions, but for the sake of this analysis will assume that he was qualified. Despite Griffin's qualifications, he has never been promoted. Griffin has proved that the FDOC selected a person in a non-protected class in some but not all of the cases. For instance, Griffin applied for a Correctional Counselor II position in January 1973, but plaintiff did not prove that the FDOC selected an individual in a non-protected class. Plaintiff did prove that in January 1974, he again applied for a Correctional Counselor II position and David Arthur, a white male, was selected With the above assumptions in mind, this court finds that Griffin did prove a prima facie case.

Defendants did prove that in January 1974, they selected an ex-offender as Correctional Counselor II in keeping with

their affirmative action policy for ex-offenders. Plaintiff never demonstrated that this reason was pretextual.

Griffin unsuccessfully applied for approximately ten promotions after December 17, 1974. Defendants advanced the reason that Griffin was not promoted because of his poor work record and attitude. This court finds that this reason is not a pretext. Although Griffin had been a satisfactory employee, his job performance was poor beginning in November 1974. His unsatisfactory record is evidenced by his performance evaluation dated December 17, 1974 (Plaintiffs' Exhibit No. I-50 [Grif)). This court has reviewed Griffin's personnel file excerpts and concludes that defendants have articulated a legitimate, nondiscriminatory reason for their failure to promote Griffin and plaintiffs have not

shown that the stated reason is merely a pretext.

Griffin also advances a claim of discriminatory or retaliatory discipline. On or about December 17, 1974, Wayne Scott, Chief Correctional Counselor at the Tallahassee Center, fired plaintiff Griffin. The following day plaintiff discussed this matter with Wayne Scott, Jerry Hicks, the Assistant Superintendent, and Robert Martin, the Personnel Manager. Assistant Superintendent Hicks reinstated plaintiff because the FDOC's termination procedures were not followed.

By letter dated January 27, 1975, plaintiff Griffin was informed that he was dismissed effective at the close of business on January 24, 1975. The letter stated seven reasons for his termination: (1) disobedience of order not to leave the Tallahassee Center to search for a

resident; (2) failure to comply with instruction to clean the Tallahassee Center; (3) inability to complete a routine form for approval for community release and furlough; (4) unauthorized personal use of official state vehicle; (5) refusal to participate in a disciplinary committee hearing; (6) use of a vehicle entrusted to a resident; and (7) insubordinate and deceitful behavior. Plaintiff successfully appealed his 1975 termination to the Career Service Commission which found that the FDOC failed to offer competent, substantial evidence to support Griffin's dismissal. Plaintiff Griffin was reinstated with back pay.

On January 24, 1975, the Equal Employment Opportunity Program Office received a complaint from Griffin which detailed both his December 1974 and

January 1975 dismissals. Donald M. Finley, a black male, investigated the complaint and found that discrimination was not a factor in Griffin's termination. See Plaintiffs' Exhibit No. I-50 (Grif), letter dated February 20, 1975, from Donald M. Finley. An Equal Employment Opportunity Program Office investigative report was issued on or about April 14, 1975. In part, the report states: "The above statistics tend to reflect that disciplinary actions have not been based upon race, but more likely, upon violations of regulations.... [T]he Equal Employment Opportunity Office finds no reasonable cause to believe that [Griffin] was discriminated against by [the FDOC] because of his race." This court finds that plaintiff's terminations were not racially discriminatory.

Griffin has been disciplined several times since his reinstatement. For instance, Griffin received a written reprimand for failing to pay for meal tickets. Griffin alleges that his white co-workers were not similarly disciplined. John Holland, Chief Correctional Counselor at the Tallahassee Center, testified that four whites and two blacks failed to pay for meal tickets. Each of the six individuals was placed on probation for six months, at which time the letters of reprimand would be pulled from their files. Griffin and Chalecki, a white officer, again violated the meal ticket policy and their reprimands remained in their respective files.

Griffin often complained to his superiors that he would be disciplined when white officers would not be disciplined. Holland testified that he

asked Griffin for the names of these other people, but Griffin has never provided this information. Plaintiff has not proven that he was treated differently because of his race.

B. Henry Dejerinett

In 1978, Henry Dejerinett applied for a position with the FDOC as a Property Manager III. The Department of Administration evaluated him, and Dejerinett received a score of 100 VP. James Vickers, a white male, interviewed Dejerinett. Kenneth Hayes, a white male, was selected. Mr. Vickers testified that he thought Mr. Hayes was more qualified than plaintiff Dejerinett because Mr. Hayes had experience in lease management, control, maintenance, and management of motor vehicles, and records management. Mr. Dejerinett testified that he did have experience in the areas of lease manage-

ment and records management but Mr. Vickers never asked him about it during the interview. Dejerinett did not assert that he was prevented from discussing his prior experience or in any manner given an unfair interview.

In 1980, Dejerinett applied again for a Property Manager III position with the FDOC. James Vickers and two other white supervisory employees interviewed Dejerinett. Gloria Thomas, a white female, was selected., however, Mr. Vickers ranked Dejerinett higher than the other two panel members.

Plaintiff has proven that he is a member of a protected class and that he applied and was qualified for the position. White persons were selected for the vacancies. This court finds that James Vickers did not select Dejerinett because he sincerely believed Kenneth

Hayes to be the best qualified applicant. Mr. Vicker's reason was legitimate and nondiscriminatory. At the worst, Mr. Vickers may be faulted for not being the best interviewer, but not for hiring in a racially discriminatory way.

Defendants have also articulated and proven a legitimate, nondiscriminatory reason for not hiring Dejerinett for the 1980 vacancy. James Vickers believed that Gloria Thomas, who had prior experience as a business manager at a state-operated facility for delinquent females, was more qualified than plaintiff Dejerinett. Dejerinett's individual claim for failure to hire must therefore fail.

PENDING MATTERS

I. HIGH SCHOOL DIPLOMA OR EQUIVALENT REQUIREMENT

Plaintiffs have challenged the statutory requirement that a correctional officer must be a high school graduate or its equivalent. See Fla. Stat. § 943.13 (1981). This issue was not tried during the trial. Instead, the parties took depositions (Documents 200-209) and then briefed the issue (Document 210, pp. 114-18; Document 211, pp. 28-53; and Document 21, pp. 16-25). The court has the issue of the validity of the high school diploma or equivalent requirement under advisement and will enter a separate order on this issue at a later date.

II. RELIEF

Plaintiffs have prevailed on one issue. This court granted summary

judgment and found that the correctional officer written examination utilized by defendants in screening applicants for correctional officer positions had a disparate impact upon class members which had not been justified by business necessity (Document 157). The parties, through their counsel, have represented to the court that they will make a good faith effort to settle any issue of relief.

III GRIFFIN'S INDIVIDUAL CLAIMS

Plaintiff Griffin has filed two pendent claims alleging lack of due process and malicious prosecution. (Second Amended Complaint, Counts II and III). The parties shall confer and then file a status report informing the court when the remainder of this case will be ready for trial.

An order to give effect to this opinion will be entered this date.

s/s August 25,1983 s/s William Stafford
WILLIAM STAFFORD
CHIEF JUDGE

§ 2000e-5. Enforcement provisions

Power of Commission to prevent unlawful employment practices

(b) Whenever a charge is filed by or on behalf of a person claiming to be aggrieved, or by a member of the Commission, alleging that an employer, employment agency, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, has engaged in an unlawful employment practice, the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employer, employment agency, labor organization, or joint labor-management committee (hereinafter referred to as the "respondent") within ten days, and shall make an investigation thereof. Charles

shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires. Charges shall not be made public by the Commission. If the Commission determines after such investigation that there is not reasonable cause to believe that the charge is true, it shall dismiss the charge and promptly notify the person claiming to be aggrieved and the respondent of its action. In determining whether reasonable cause exists, the Commission shall accord substantial weight to final findings and orders made by State or local authorities in proceedings commenced under State of local law pursuant to the requirements of subsections (c) and (d) of this section. If the Commission determines after such investigation that there is reasonable cause to believe that the charge is true,

the Commission shall endeavor to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion. Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. Any person who makes public information in violation of this subsection shall be fined not more than $1,000 or imprisoned for not more than one year, or both. The Commission shall make its determination on reasonable cause as promptly as possible and, so far as practicable, not later than one hundred and twenty days from the filing of the charge or, where applicable under subsection (c) or (d) of this section, from the date upon which

the commission is authorized to take action with respect to the charge.